Supreme Court, U.S.
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No. 10- 10-404

IN THE

Supreme Court of the United States

MALCOLM G. SCHAEFER,

Petitioner,

v.

JOHN R. MCHUGH, SECRETARY OF THE ARMY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a party challenging an agency's refusal to follow its own regulations under *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), also bears the burden of establishing prejudice from that refusal.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Malcolm G. Schaefer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 608 F.3d 851. The district court's opinion (Pet. App. 8a-31a) is reported at 607 F. Supp. 2d 61. The decision of the Army Board for Correction of Military Records is unreported and reproduced at Pet. App. 32a-97a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The court of appeals entered judgment on June 22, 2010. Pet. App. 7a. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The pertinent regulatory provisions are set out in the regulatory addendum.

STATEMENT OF THE CASE

The decision below deepens a preexisting three-way circuit split on an important and recurring question of administrative law: Whether a party challenging agency action must demonstrate prejudice from that agency's failure to comply with its own regulations. Petitioner sued the Secretary of the Army under the Administrative Procedure Act ("APA"), claiming among other things that the Army's attempted

revocation of his honorable discharge violated *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), which holds that administrative agencies are obligated to follow their own regulations. After Petitioner had received an honorable disability discharge from the Army, the Army sought to revoke that discharge without following its own regulations governing the procedures for alteration or revocation of disability discharge orders.

In the decision below, the D.C. Circuit assumed that the Army violated its regulations but excused that violation by holding that Petitioner failed to demonstrate any prejudice from the Army's refusal to abide by its regulations. Pet. App. 6a. In doing so, the D.C. Circuit joined two other circuits in holding that a party must demonstrate prejudice whenever challenging an agency's failure to follow its applicable regulations, regardless of the rights protected by those regulations. See *Kohli* v. *Gonzales*, 473 F.3d 1061, 1068-69 (9th Cir. 2007); *PAM, S.p.A.* v. *United States*, 463 F.3d 1345, 1348 (Fed. Cir. 2006). In contrast, the Second, Third, and Seventh Circuits hold that no showing of prejudice is required when, as here, an agency departs from regulations designed to protect constitutional or statutory rights. *Leslie* v. *Att'y Gen. of United States*, 611 F.3d 171 (3d Cir. 2010); *Martinez-Camargo* v. *INS*, 282 F.3d 487, 490, 492 (7th Cir. 2002); *Waldron* v. *INS*, 17 F.3d 511, 518 (2d Cir. 1993). The decision below also conflicts with the Sixth Circuit, which has held that a claimant need not show prejudice when an agency disregards applicable regulations that confer important procedural rights and benefits. *Wilson* v. *Comm'r*, 378 F.3d 541, 546-47 (6th Cir. 2004).

Scholars have highlighted the conflict and confusion among the lower courts, noting that

application of this Court's holding in *Accardi* "is laced with uncertainties." Thomas W. Merrill, *The* Accardi *Principle*, 74 Geo. Wash. L. Rev. 569, 570 (2006); see also Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of Its Own Regulations or Other Misconduct*, 44 Admin. L. Rev. 653, 669 (1992).

The decision below squarely implicates this deep conflict over a fundamental and recurring issue of federal administrative law. Here, the court of appeals excused an agency's failure to follow its regulations because it concluded that Petitioner also was obligated to establish prejudice. Pet. App. 6a. Likewise, the Ninth Circuit and Federal Circuit would have required a showing of "prejudice." In contrast, in the Second, Third, Fourth, Sixth and Seventh Circuits, Petitioner would not have been required to make a showing of prejudice apart from the agency's refusal to follow regulations that were designed to protect the rights of individuals such as Petitioner. As a result, the conflict among the federal circuits is outcome determinative in this case.

The Court should grant the petition to resolve this conflict over the appropriate standard to apply under *Accardi* when agency action is challenged because the agency failed to follow its regulations.

I. REGULATORY BACKGROUND.

As directed by Congress and the Department of Defense, the Army has established, through detailed regulations, a Physical Disability Evaluation System ("Evaluation System") to govern the separation of disabled soldiers from the Army. 10 U.S.C. §§ 1216(a), 1222(c); Dep't of Defense Directive

("DODD") 1332.18; Army Reg. 635-40 ¶ 1–1 (1990) (Pet. App. 98a-193a).[1]

By their terms, these regulations are designed to "[p]rovide prompt disability processing while ensuring that the rights and interests of the Government and the soldier are protected." Army Reg. 635-40 ¶ 1–1(c). In furtherance of this purpose, the Army had to ensure that the Evaluation System "consist[s] of four elements: medical evaluation; physical disability evaluation, to include appellate review; counseling; and final disposition." DODD 1332.18 ¶ 3.2. Accordingly, Army regulations established:

> 1) Medical Evaluation Boards ("Medical Boards") to evaluate a soldier's "medical qualification for retention," Army Reg. 635-40 ¶ 4–10; *id.* ¶¶ 4–9 to 4–11;
>
> 2) Physical Evaluation Boards ("Physical Boards") to determine a soldier's fitness for duty and to make any recommendations necessary to establish a soldier's eligibility to be separated from the Army, *id.* ¶ 4–17(a), with review for approval, correction, or revision available through the U.S. Army Physical Disability Agency ("Disability Agency"), *id.* ¶ 4–22(a);
>
> 3) Physical Evaluation Board Liaison officers ("Liaison Officers") to provide counseling to the soldier during the evaluation process, *id.* ¶ 4–12; and
>
> 4) U.S. Total Army Personnel Command ("Personnel Command") to "[a]ccomplish final

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[1] Army Regulation 635-40 was subsequently revised on February 8, 2006. The proceedings in this matter were governed by the earlier regulation. See Pet. App. 9a n.2.

administrative actions," namely to "issue needed orders or other instructions for the S[ecretary of the] A[rmy]," *id.* ¶¶ 2–3, 4–24.

Medical Boards "document" a soldier's medical condition and refer "those soldiers who do not meet medical retention standards" to a Physical Board. *Id.* ¶¶ 4–10, –13. Physical Boards investigate the nature and extent of a soldier's disability, provide a hearing upon request from the soldier, and make "findings and recommendations" concerning the soldier's eligibility for a disability discharge. *Id.* ¶ 4–17(a)(1)-(4).

After receiving counseling on a Physical Board's findings, the soldier has ten days to concur or disagree with the findings and submit a rebuttal or request a hearing. *Id.* ¶¶ 4–20(c), 4–21(s). If the soldier concurs, the Physical Board may approve the findings on behalf of the Secretary of the Army and forward the case to Personnel Command "for final disposition." *Id.* ¶ 4–20(e)(1)-(3); *id.* ¶ 4–19(b). If the soldier disputes the findings, the Disability Agency will review the case and decide whether to concur with the Physical Board, remand the case for reconsideration, or issue revised findings, *id.* ¶ 4–22(c). If the Disability Agency agrees with the findings, it must "forward the case to [Personnel Command] for disposition." *Id.* ¶ 4–22(g)(5).

Under the regulations, Personnel Command has the overall responsibility to "dispose of the case by publishing orders or issuing proper instructions to subordinate headquarters, or return any disability evaluation case to [the Disability Agency] for clarification or reconsideration when newly discovered evidence becomes available." *Id.* ¶ 4–24; *see id.* ¶ 2–3(b). Personnel Command has authority to issue instructions for separation based on physical

disability or return a soldier to duty if that soldier is physically fit. *Id.* ¶ 4–24(b)(1)-(9).

The actual orders are published by and are the responsibility of the adjutant at a particular headquarters (*i.e.*, military installation), and "[o]nly the organization that published the original order may amend, rescind, or revoke the order." Army Reg. 600-8-105 ¶¶ 1–11(a), (b), 2–21(a). Once an adjutant has issued disability discharge orders, only Personnel Command may issue instructions to the adjutant to alter or revoke those orders. Army Reg. 635-40 App. E–9(e).[2]

A soldier is discharged from the Army when, according to his or her orders, (1) a facially valid discharge certificate is delivered (actually or constructively) to the soldier; (2) there is a final accounting of pay; and (3) the clearing process is completed. 10 U.S.C. §§ 1168(a), 1169; *United States* v. *King*, 42 M.J. 79, 80 (C.A.A.F. 1995). Discharge ends the Army's jurisdiction over a soldier, with the sole exception that Article 3(b) of the Uniform Code of Military Justice ("UCMJ") provides that a former soldier may be charged "with having fraudulently obtained his discharge [and] is [then] subject to trial by court-martial on that charge." 10 U.S.C. § 803(b).

II. BACKGROUND OF THE CASE.

A. Factual Background.

1. Petitioner Malcolm G. Schaefer graduated from West Point in 1990 and was commissioned as a Second Lieutenant in the Infantry. Pet. App. 47a. Later, Schaefer applied to the Army's Funded Legal Education Program, through which he attended the

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[2] The Disability Agency lacks authority to issue orders, including revocation orders. D.C. Circuit Appendix 44, 61, 124.

University of Virginia School of Law. Pet. App. 9a, 47a-48a. In 1996, Schaefer began serving a six-year commitment to the U.S. Army Judge Advocate General's Corps ("JAG Corps") at Fort Benning, Georgia, where he received superlative ratings. Pet. App. 2a, 9a, 48a.

Throughout his time in the military, Schaefer experienced increasing chronic knee pain. He had surgery on his left knee in 1996 and surgery on his right knee in 1999. D.C. Circuit Appendix ("CADC App.") 342-43. Despite extraordinary efforts at physical therapy, *id.* at 587-99, 600-02, Schaefer's knee condition continued to deteriorate, preventing his scheduled deployment overseas, *id.* at 223, 254-55.

In September 2000, Schaefer was referred into the Army's Evaluation System. Pet. App. 9a, 48a. On June 11, 2001, a Physical Board determined that Schaefer was physically unable to perform the duties required by his grade and military specialty, *id.* at 48a, and recommended his separation from the Army, *id.* at 10a, 48a. Schaefer concurred with this finding, and, on July 2, 2001, the Fort Benning Headquarters, through the Adjutant General, published self-executing separation orders to Schaefer. *Id.* at 10a-11a. These orders commanded Schaefer to report on September 14, 2001, to a transition point to be discharged from the Army. *Id.* at 11a, 49a. Schaefer promptly notified his JAG supervisor of the discharge orders, and together they informed the JAG Corps' Personnel, Plans and Training Office ("Training Office"). CADC App. 189-90, 125, 413, 419, 449.

Shortly thereafter, in August 2001, individuals within the JAG Corps attempted to revoke Schaefer's discharge orders. The Commander of the Disability Agency, without a request to or authority from

Personnel Command, instructed a Disability Agency lawyer to hold Schaefer's discharge. Pet. App. 12a; CADC App. 246, 274, 278. That lawyer instructed a technician to remove a computer code that authorized Schaefer's separation. Pet. App. 12a. She later did so, but left Schaefer's September 14, 2001 discharge date unchanged. *Id.* at 12a-13a; CADC App. 193, 274, 428, 431.

The chief of the Training Office submitted to the Disability Agency a memorandum stating his view that Schaefer could effectively perform his assigned duties. Pet. App. 11a-12a. Unbeknownst to Schaefer and without authorization from Personnel Command, the Disability Agency returned Schaefer's file to the Physical Board on the basis of a conversation between the Agency's lawyer and a Board member. *Id.* at 12a; CADC App. 294. The Physical Board then undertook to re-evaluate Schaefer's case and, on August 30, 2001, made an initial determination that Schaefer was fit for duty, asserting that its previous determination was superseded. Pet. App. 12a, 49a. Schaefer agreed with a Liaison Officer that the Physical Board's finding would not be final under Army regulations until after Schaefer's September 14, 2001 discharge date. *Id.* at 49a-50a.

Personnel Command never altered Schaefer's pre-existing discharge orders, nor did Fort Benning Headquarters ever issue a subsequent order or instruction rescinding or revoking Schaefer's July 2 orders prior to his September 14th discharge date. CADC App. 125, 200-01, 270, 316, 464-66, 469. On the advice of counsel, Schaefer appeared at the transition point on September 14, 2001, as required by his discharge orders. Pet. App. 13a. The Army issued Schaefer a discharge certificate and completed his Honorable Discharge from the Army. *Ibid.*

On September 18, four days *after* his discharge from the Army, Fort Benning headquarters issued orders purporting to revoke Schaefer's discharge orders. Pet. App. 49a-50a. On October 29, 2001, the Army ordered Schaefer to report for duty at the JAG Corps office at Fort Benning, claiming that his discharge was invalid and threatening to "take 'appropriate measures to return [him] to military control.'" *Id.* at 14a. Schaefer sought a temporary restraining order against the Army, see *Schaefer* v. *White*, 174 F. Supp. 2d 1374 (M.D. Ga. 2001), and the Army brought court-martial charges against him for fraudulent separation, Pet. App. 14a; see 10 U.S.C. § 883. After being denied a temporary restraining order, and in light of the court-martial charges, Schaefer involuntarily returned to the Army to face court-martial proceedings. Pet. App. 15a.

In December 2001, the Army conducted an Article 32 investigation (the military substitute for a grand jury), see 10 U.S.C. § 832, after which the investigating officer determined that there were no reasonable grounds to believe Schaefer obtained a fraudulent discharge because his discharge orders remained valid when he appeared for separation. Pet. App. 16a; CADC App. 186. The investigating officer concluded that "the bases for the discharge orders had not been overturned or revoked on September 14, 2001 when [Schaefer] presented himself for separation." Pet. App. 16a.

The Commanding General, on the advice of his Staff Judge Advocate, nevertheless referred the fraudulent separation charge to a general court-martial on March 1, 2002. Pet. App. 16a. After arraignment, but prior to trial, Schaefer submitted a Resignation for the Good of the Service in Lieu of Court-Martial. *Id.* at 16a-17a. In the resignation,

Schaefer made clear that he was a civilian who had been discharged on September 14, 2001, and that he had not voluntarily submitted to the Army's jurisdiction. *Id.* at 74a-75a. On July 19, 2002, the Army approved Schaefer's resignation, and, on October 1, 2002, gave Schaefer a General (Under Honorable Conditions) Discharge. *Id.* at 17a, 82a. That discharge was a step below the Honorable Discharge that Schaefer received on September 14, 2001.

2. On September 8, 2004, Schaefer requested that the Army Board for Correction of Military Records ("Correction Board") correct his military records by, among other things, confirming that he was honorably discharged on September 14, 2001, and declaring his subsequent October 2002 discharge null and void. Pet. App. 34a. Schaefer showed that his original discharge orders had never been revoked because the Army had failed to follow applicable regulations necessary for revocation of discharge orders. Specifically, Personnel Command never issued instructions rescinding, holding, or revoking his orders, nor had it recalled his case for a second Physical Board determination. Accordingly, on September 14, 2001, Schaefer had been discharged from the Army and was beyond its jurisdiction. Schaefer further demonstrated that, because he was a civilian, the Army's attempt to exercise jurisdiction over him under Article 3(b) of the UCMJ was unconstitutional under *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955).

The Correction Board denied Schaefer's request. Although the Correction Board agreed with Schaefer that Army regulations provide that only Personnel Command can issue instructions to revoke duly issued discharge orders, it stated that the governing

regulations were "outdated." Pet. App. 90a. According to the Correction Board, the functions of Personnel Command have been assumed by the Disability Branch, which is an adjunct of the Disability Agency and under its authority. *Ibid.* Thus, the Correction Board concluded that, despite clear contrary Army Regulations, the Disability Agency had the authority to direct Fort Benning to revoke Schaefer's discharge orders and that the Disability Agency or Physical Board could then reconsider Schaefer's case. *Ibid.*

As to the Army's claim of fraudulent separation, the Correction Board concluded that even though Schaefer complied with facially valid discharge orders, he nevertheless misrepresented himself on September, 14, 2001, because he knew the second Physical Board findings "would *probably be approved*" and thus that his discharge orders would likely be revoked. Pet. App. 92a (emphasis added).

B. Procedural Background.

On August 30, 2007, Schaefer filed suit against the Secretary of the Army, alleging that the Army violated his constitutional rights and the APA. Among other things, Schaefer claimed that the Correction Board acted arbitrarily, capriciously, and contrary to law in refusing to correct his military records because the Army had violated the *Accardi* doctrine by disregarding applicable regulations. Pet. App. 24a.

The district court granted summary judgment in favor of the Secretary. Pet. App. 31a. Although the court recognized that agencies must follow their regulations, *id.* at 24a, it gave "deference" to the Correction Board's view of the "outdated" Army regulations, holding that the board did not act

arbitrarily, capriciously, or otherwise contrary to law, *id.* at 24a-25a. The court thus approved the Correction Board's finding that Schaefer was not actually discharged from the Army until October 2002. Schaefer timely appealed.

The Court of Appeals for the District of Columbia Circuit affirmed the judgment of the district court. Pet. App. 7a. The court assumed that the Army failed to abide by applicable regulations when it revoked the authorization for Schaefer's discharge and resolved the case solely on whether the regulatory violation resulted in prejudice to Schaefer. *Id.* at 6a. Citing the rule it adopted in *Steenholdt* v. *FAA*, 314 F.3d 633, 639-40 (D.C. Cir. 2003), and affirmed in *Battle* v. *FAA*, 393 F.3d 1330, 1336 (D.C. Cir. 2005), the court held that "[a] party claiming harm from an agency's failure to follow its own rules must demonstrate some form of prejudice." Pet. App. 6a. The court concluded that "Schaefer failed to show that he suffered any prejudice from the Army's alleged error regarding which entity could technically revoke the authorization for his discharge." *Ibid.*

REASONS FOR GRANTING THE PETITION

The decision below directly implicates a three-way conflict among the circuits on a fundamental and recurring issue of administrative law: Whether a claimant bears the burden of demonstrating prejudice from an agency's failure to follow its own regulations to prevail in a challenge to that agency's decision.

First, the decision below applies the same standard as two other circuits—the Ninth and Federal—in holding that a party must always demonstrate prejudice when challenging an agency's failure to follow applicable regulations. In contrast with these circuits, the Second, Third, and Seventh Circuits hold

that no showing of prejudice is required when an agency violates regulations designed to protect constitutional or statutory rights. The Sixth Circuit, by contrast, holds that a claimant does not need to show prejudice when an agency fails to follow applicable regulations that confer important procedural rights and benefits.

Under the law in the Second, Third, Seventh, and Sixth Circuits, Schaefer would have been entitled to relief. Because this case was brought in the D.C. Circuit, however, he was denied relief because that court requires an additional showing of prejudice. Accordingly, this case is an appropriate vehicle to resolve the underlying conflict among the federal circuit courts. This Court should grant this petition to resolve the conflict.

Second, the Court should also grant the petition because the decision below conflicts with this Court's decisions under *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954). Under the *Accardi* doctrine, this Court has stated that no showing of prejudice is necessary when an agency fails to abide by regulations that are designed to "confer important procedural benefits upon individuals." *Am. Farm Lines* v. *Black Ball Freight Serv.*, 397 U.S. 532, 538-39 (1970). These types of rules stand in contrast with "procedural rules adopted for the orderly transaction of business," the violation of which may not warrant relief absent a showing of prejudice. *Id.* at 539. The D.C. Circuit here adopted a test that requires a showing of prejudice in all cases. Review should be granted because the decision below conflicts sharply with this Court's jurisprudence.

I. THIS CASE IMPLICATES A DEEP CONFLICT AMONG THE FEDERAL CIRCUITS ON WHETHER A PARTY CHALLENGING AN AGENCY'S FAILURE TO FOLLOW ITS REGULATIONS ALSO MUST ESTABLISH PREJUDICE.

The Court should grant the petition to resolve a three-way conflict among the circuit courts on a fundamental issue of administrative law. In the decision below, the D.C. Circuit denied Schaefer relief because it concluded that he was obligated to show that the Army's failure to follow its own regulations resulted in prejudice to his rights. The Ninth and Federal Circuits apply the same standard. In contrast, the Second, Third, and Seventh Circuits do not require any showing of prejudice when an agency violates regulations which, as here, are designed to protect constitutional or statutory rights of individuals. Similarly, the Sixth Circuit does not require a showing of prejudice when an agency fails to abide by regulations that confer important procedural rights and benefits.

A. There Is A Deep Conflict Over Whether A Party Challenging An Agency's Refusal to Follow Its Regulations Must Demonstrate Prejudice.

1. In the decision below, the D.C. Circuit held that "[a] party claiming harm from an agency's failure to follow its own rules must demonstrate some form of prejudice." Pet. App. 6a. The court assumed "procedural error" and a "violation of regulations" by the Army when it revoked the authorization for Schaefer's September 14, 2001 discharge order. *Ibid.* It nevertheless rejected Schaefer's challenge because it concluded that he supposedly "failed to show that he suffered any prejudice from the Army's alleged

error." *Ibid.* That is, the court adopted a standard by which any party challenging an agency's failure to follow its regulations also must demonstrate prejudice.[3]

The Ninth and Federal Circuits similarly require a showing of prejudice by all who contend that an agency has failed to follow applicable regulations. In *Kohli* v. *Gonzales*, 473 F.3d 1061 (9th Cir. 2007), the Ninth Circuit reviewed a petition seeking to vacate a Board of Immigration Appeals ("BIA") order because the signature and title of the issuing officer on the original notice to appear were illegible. *Id.* at 1064. Kohli argued that the lack of information deprived the BIA of jurisdiction. *Id.* at 1063. The court explained that "[w]hen presented with allegations that an agency has violated its own regulations, we have recognized that ... in order to be granted relief 'the claimant must show that he was prejudiced by the agency's mistake.'" *Id.* at 1066 (quoting *Patel* v. *INS*, 790 F.2d 786, 788 (9th Cir. 1986)).[4] The court concluded that "the alleged defect was not prejudicial," and in the absence of any showing that the illegible name and signature "obscured the

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[3] This decision follows other D.C. Circuit's decisions requiring a showing of prejudice for *Accardi* claims. See *Battle*, 393 F.3d at 1336 ("*Accardi* has come to stand for the proposition that agencies may not violate their own rules and regulations to the prejudice of others."); *Steenholdt*, 314 F.3d at 639 (holding that without individualized prejudice "the *Accardi* doctrine" does not provide "a basis for review").

[4] This simply restated the long-standing rule in the Ninth Circuit: "Violation of a regulation renders [agency action] unlawful *only if* the violation prejudiced interests of the [person] which were protected by the regulation." *United States* v. *Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979) (emphasis added).

charges against her or obstructed her ability to respond to the charges and present her requests for asylum and other relief," it would deny relief. *Id.* at 1068-69.

The Federal Circuit likewise requires a showing of prejudice in all circumstances. In *PAM, S.p.A* v. *United States*, 463 F.3d 1345 (Fed. Cir. 2006), the Federal Circuit addressed whether the Department of Commerce could relax its own regulations on service of requests for administrative review. *Id.* at 1346. There, the Court of International Trade held void an anti-dumping duty order as applied to PAM because Commerce had inappropriately relaxed its regulations, rather than requiring strict adherence. The Federal Circuit vacated, holding that "the Court of International Trade should have conducted an analysis of whether PAM proved substantial prejudice, *regardless whether the regulation confers an important procedural benefit*." *Id.* at 1348 (emphasis added); see also *Intercargo Ins. Co.* v. *United States*, 83 F.3d 391, 396 (Fed. Cir. 1996) (reversing judgment for importer that "suffered no prejudice").

2. In direct conflict, the Third, Second, and Seventh Circuits hold that an agency's failure to abide by its regulations designed to protect constitutional and statutory rights is *per se* grounds for invalidation, without any showing of prejudice.

In *Leslie* v. *Attorney General of the United States*, 611 F.3d 171 (3d Cir. 2010), the Third Circuit vacated a removal order because the immigration judge failed to advise the alien of the availability of free legal services, as required by Immigration and Naturalization Service ("INS") regulations. *Id.* at 182. The court determined that the applicable regulation was "designed to protect an alien's

fundamental statutory and constitutional right to counsel at a removal hearing," *id.* at 182, and held that "when an agency promulgates a regulation protecting fundamental statutory or constitutional rights of parties appearing before it, the agency must comply with that regulation," regardless of "prejudice resulting from its violation," *id.* at 180-82.

Likewise, in *Waldron* v. *INS*, 17 F.3d 511 (2d Cir. 1993), the Second Circuit held that a claimant need not demonstrate prejudice for agency violations of regulations implicating fundamental constitutional or statutory rights. There, an immigration judge failed to certify the case and notify the alien of his right to contact diplomatic officials, in violation of INS regulations. *Id.* at 518. The court determined that because the applicable regulations did not implicate "fundamental rights with constitutional or federal statutory origins," the challenged proceeding would be invalidated "only upon a showing of prejudice to the rights sought to be protected by the subject regulation." *Ibid.* The court explicitly "decline[d] to adopt the *Calderon-Medina* approach" of the Ninth Circuit, "which requires a demonstration of prejudice irrespective of whether the subject regulation was designed to protect a fundamental right derived from the Constitution or a federal statute." *Ibid.* Instead, the Second Circuit explained that "when a regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute," failure to abide by it requires remand. *Ibid.* However, when the regulation "does not affect fundamental rights," the court held that "it is best to invalidate a challenged proceeding only upon a showing of prejudice." *Ibid.*

The Seventh Circuit recognized the same rule in *Martinez-Camargo* v. *INS*, 282 F.3d 487 (7th Cir.

2002). There, the Seventh Circuit determined that the INS violated agency regulations when an arresting officer interrogated a detained alien but upheld the subsequent deportation order because the alien "failed to allege or to prove that he suffered prejudice" as a result of the officer's conduct. *Id.* at 490. Although the court stated that a regulatory violation renders agency action unlawful if it "can be deemed prejudicial," it explained that "an agency action can be deemed prejudicial" automatically "when it violates the Constitution," or it involves a "complete disregard of a framework designed to insure the fair processing of an individual," *id.* at 492.

3. Finally, the Sixth Circuit has held that a party need not show prejudice when an agency violates regulations that confer important procedural rights and benefits. In *Wilson* v. *Commissioner of Social Security*, 378 F.3d 541 (6th Cir. 2004), the Sixth Circuit confronted an administrative law judge's failure to give "good reasons" for rejecting a treating physician's opinion, as required by the Social Security Administration's ("SSA") regulations. *Id.* at 546. The court vacated the SSA decision, concluding that "[a] court cannot excuse the denial of a mandatory procedural protection" regardless of the particular harm that may accompany its violation. *Ibid.* Following this Court's decision in *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532 (1970), the Sixth Circuit distinguished between regulations that "bestow[ ] a 'substantial right' on parties" and those that are "'adopted for the orderly transaction of business.'" *Wilson*, 378 F.3d at 547. Agencies must strictly comply with rules that bestow substantial rights and benefits on parties, but relief from a failure to follow a procedural rule designed for the orderly transaction of business requires

"'substantial prejudice to the complaining party.'" *Ibid.* In this case, the court determined that the applicable regulation conferred a "substantial" procedural right that the SSA was not free to disregard. *Ibid.*

Thereafter, in *Bowen* v. *Commissioner of Social Security*, 478 F.3d 742 (6th Cir. 2007), the Sixth Circuit vacated an SSA decision on the ground that the administrative law judge failed to address the opinion of the claimant's treating psychologist, as required by department regulations. *Id.* at 743. The court reasoned that because the applicable regulation "provides claimants with an 'important procedural safeguard,' the SSA was not free to relax or disregard the rule," *id.* at 747 (quoting *Wilson*, 378 F.3d at 547), and declined to recognize a "harmless-error exception" in reaching its conclusion that the SSA decision was invalid, *id.* at 750.

The Fourth Circuit also has strongly suggested its agreement with the Sixth Circuit's approach. In *United States* v. *Morgan*, 193 F.3d 252 (4th Cir. 1999), the court of appeals faced an apparent violation of Bureau of Prison regulations that "established certain procedural benefits for inmates in the custody of the Attorney General facing the prospect of forcible medication," including entitlement to a qualified staff representative. *Id.* at 265. In evaluating this apparent failure, the court explained that generally "claimants [must] demonstrate prejudice resulting from the violation" of regulations but that showing was unnecessary when "'[t]he rules were ... intended primarily to confer important procedural benefits upon individuals.'" *Id.* at 267 (quoting *Am. Farm Lines*, 397 U.S. at 538-39). The court recognized that the "fact that a particular regulation or procedure is not mandated by the

Constitution or by statute is of no moment for purposes of an analysis under the *Accardi* doctrine." *Ibid.*

B. The Conflict Among The Federal Courts Concerns A Recurring And Fundamentally Important Question That Is Squarely Implicated In This Case.

1. Whether a party challenging agency action must demonstrate prejudice from that agency's failure to follow its own regulations is an important and recurring issue that warrants this Court's review. The *Accardi* doctrine—that agencies must comply with their regulations—has roots in several important principles of law. The Court has recognized that this requirement is (i) "inherent in the nature of delegated 'legislative power,'" (ii) "required by due process," and (iii) "a principle of administrative common law." Merrill, *supra* at 569. Yet, the requirement that claimants prove prejudice has been described as one in a judicial "bag of tricks for manipulating the *Accardi* principle." *Id.* at 594. Given this possible manipulation of a foundational principle of administrative law, courts have continually struggled with whether, and when, a showing of prejudice is required. See, *e.g.*, *Leslie*, 611 F.3d at 180-82 (discussing various circuit approaches). This Court should intervene to provide needed clarity regarding the scope of the *Accardi* doctrine.

2. This case provides an ideal vehicle for resolving this conflict among the federal courts. In the decision below, the D.C. Circuit declined to conduct any inquiry into the regulations that the Army refused to follow when it purported to reverse the original unfit for duty finding and to revoke

Schaefer's honorable discharge. Pet. App. 6a. Instead, the court simply applied a blanket "prejudice" test that would immunize an agency's failure to follow its own rules and concluded that Schaefer "failed to show that he suffered any prejudice" from the regulatory violation. *Ibid.* Had this case arisen in the Second, Third, or Seventh Circuits, or in the Sixth Circuit, the result would have been different.

In the Second, Third, and Seventh Circuits, a claimant need not demonstrate prejudice from an agency's failure to follow its regulations when those regulations are designed to "protect a fundamental right derived from the Constitution or a federal statute." *Waldron*, 17 F.3d at 518. Here, the regulations protect numerous constitutional and statutory rights that turn on whether an individual is a soldier or civilian. While civilians enjoy the full protections of the United States Constitution—structural, procedural, and substantive—Congress may establish certain rules for soldiers that do not meet all the typical constitutional safeguards. U.S. Const. art. I, § 8, cl. 14 ("The Congress shall have Power ... [t]o make Rules for the Government and Regulation of the land and naval Forces"); see *Reid* v. *Covert*, 354 U.S. 1, 7, 19-20 (1957) (plurality); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955); *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1857). As such, the Constitution draws important distinctions between the rights of soldiers and civilians. See, *e.g.*, *Solorio* v. *United States*, 483 U.S. 435, 439 (1987) ("In an unbroken line of decisions from 1866 to 1960, this Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused.").

The regulations that were disregarded below are designed to provide a procedural system to ensure the precise line between soldier and civilian for those in the Army's disability evaluation system. In commanding the Army to establish an Evaluation System, the Department of Defense specifically mandated that the system consist of four distinct elements, one of which governs "final disposition." DODD 1332.18 ¶ 3.2. In furtherance of that command, the Army gave Personnel Command exclusive authority to "[a]ccomplish final administrative actions" and "issue needed orders and other instructions for the" Secretary of the Army, Army Reg. 635-40 ¶ 2–3, 4–24, including to "dispose of the case ... or issue proper instructions to subordinate headquarters," *id.* ¶ 4–24, such as rescinding or revoking discharge orders, *id.* App. E-9(e).

Here, the Army disregarded the regulations requiring Personnel Command to issue orders and instructions that alter existing discharge orders. After Schaefer received a valid discharge order from the Army, the regulations provided that only Personnel Command could issue instructions to revoke those discharge orders or to return a closed case back to a Physical Board. Army Reg. App. E–9(e); *id.* ¶¶ 2–3(b), 4–24. It is undisputed that Personnel Command never issued any instructions to suspend or revoke those orders. Nor did it authorize the return of Schaefer's case to the Physical Board. See *id.* ¶ 4–19(p). Instead, other entities (or individuals) within the Evaluation System attempted to circumvent the regulations and act on their own. Indeed, the Correction Board dismissed the violation of the Army's regulations by characterizing the existing regulations as "outdated."

Army and DOD regulations specify the entities that have authority to affect a soldier's discharge from the Army. This delineation of authority ensures a definitive understanding as to whether a soldier has been discharged and is guaranteed full constitutional protections, or remains in the military and enjoys only limited protections. Because the Army disregarded regulations designed to protect constitutional rights, Schaefer would not have been required to demonstrate "prejudice" if this case had arisen in the Second, Third, or Seventh Circuits.

For similar reasons, the result in this case would have been different in the Sixth Circuit too. In the Sixth Circuit, a showing of prejudice is not required when the agency violates regulations that bestow important procedural rights and benefits. Those are precisely the type of regulations the Army violated here. An explicit objective of the Army's regulations establishing the Evaluation System is to "ensur[e] that the rights and interests of ... the soldier are protected." Army Reg. 635-40 ¶ 1–1(c). And the Army's violation of those regulations runs against a crucial element of that Evaluation System.

As explained above, the Army gave Personnel Command authority over final dispositions and instructions affecting disabled soldiers who are being separated from service. The multiphase process created by the regulations is not a rule of administrative efficiency, see *Wilson*, 378 F.3d at 547; rather, the regulations mandating separate and final disposition by Personnel Command were adopted to establish a physical disability evaluation system with four distinct and sequential elements serving unique purposes. DODD 1332.18 ¶ 3.2 (directing the Army to establish an evaluation system that "consist[s] of four elements: medical evaluation; physical disability

evaluation, to include appellate review; counseling; and final disposition."). The ultimate objective of that system is to protect the rights of the soldier. Yet, the Army disregarded the requirement that only Personnel Command may issue instructions that revoke a previously-issued discharge order. It did so even though the Army's regulations governing Schaefer's discharge specify that they are designed not only to protect the Army's interests, but also to ensure that the "rights and interests of ... the soldier are protected." Army Reg. 635-40 ¶¶ 1–1(c). Given the "important procedural safeguard[s]" that the regulations ensure, *Wilson*, 378 F.3d at 547, the Army "was not free to relax or disregard" the regulations, *Bowen*, 478 F.3d at 747. No prejudice showing would have been required in the Sixth Circuit.

The Court should grant the petition in this case to resolve the conflict among the courts of appeals.

II. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

This Court also should grant the petition because the decision below conflicts with this Court's decisions under the *Accardi* doctrine. In the decision below, the D.C. Circuit required a showing of prejudice in all circumstances in which an agency violates its own regulations. That determination cannot be reconciled with this Court's decisions holding that a finding of prejudice is not required under these circumstances.

This Court has long maintained that federal agencies must comply with their own regulations. See *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 155 (1923) (an affected party is "legally entitled

to insist upon the observance of rules promulgated by [an agency] pursuant to law"); *Ariz. Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 389 (1932) (an agency may not "ignore its own pronouncement promulgated in its quasi legislative capacity"). In *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), the Court established what is now regarded as the *Accardi* doctrine—the principle that an agency is obligated to follow its own regulations—but made no mention of a prejudice requirement.

In *Accardi*, the Court vacated a BIA removal order because the agency violated the "unequivocal terms" of applicable regulations. *Id.* at 266. By regulation, the Attorney General had vested authority in the Board to dispose of cases. The Court held that by assigning authority to the Board through regulation, the Attorney General could not dictate the Board's decision, even though he had ultimate removal authority. *Id.* at 266-67. The court explained that "as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner." *Id.* at 267.

This Court's initial application of the *Accardi* doctrine confirmed the absence of any prejudice inquiry in reviewing an agency's failure to abide by its own regulations. See *Service* v. *Dulles*, 354 U.S. 363, 388-89 (1957) (having adopted applicable regulations, the State Department could not "proceed without regard to them"); *Vitarelli* v. *Seaton*, 359 U.S. 535, 545 (1959); *Yellin* v. *United States*, 374 U.S. 109, 114-21 (1963) (reversing a contempt of Congress conviction based on "the Committee's failure to comply with its own rules"). The Court required agencies scrupulously to follow their own regulations,

finding a deviation from those regulations "illegal and of no effect." *Vitarelli*, 359 U.S. at 545.

In *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532 (1970), the Court, in applying *Accardi*, distinguished between agency rules "intended primarily to confer important procedural benefits upon individuals," and "procedural rules adopted for the orderly transaction of business." *Id.* at 538-39. The Court concluded that violation of the latter need not result in judicial invalidation of the agency's action absent prejudice to the complaining party. *Ibid.*

Shortly thereafter, the Court reaffirmed that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures," without any reference to an evaluation of individual prejudice. *Morton* v. *Ruiz*, 415 U.S. 199, 235 (1974). This Court later emphasized that "[a] court's duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Constitution or federal law." *United States* v. *Caceres*, 440 U.S. 741, 749 (1979).

In all of these cases, this Court recognized that presumptively an agency's failure to follow its regulations is "illegal and of no effect." *Vitarelli*, 359 U.S. at 545; see *Am. Farm Lines*, 397 U.S. at 538-39 (discussing this Court's precedent). The "premise that regulations bind with equal force whether or not they are outcome determinative" is implicit throughout this Court's decisions, particularly with respect to procedures designed to safeguard individual interests. *United States* v. *Caceres*, 440 U.S. 741, 764 (1979) (Marshall, J., dissenting) (noting that "[i]f prejudice becomes critical" to such determinations government officials "may simply

dispense with whatever procedures are unlikely to prove dispositive in a given case").

In direct conflict with this Court's clear rulings, the D.C. Circuit has joined two other circuits in adopting a uniform prejudice requirement for all circumstances in which an agency departs from its own regulations. This rule conflicts with this Court's precedent and undermines a "firmly established" principle of administrative law, *Vitarelli*, 359 U.S. at 547 (Frankfurter, J., concurring). The decision below is particularly troubling because the regulations violated by the Army protect important procedural benefits for soldiers moving through the Evaluation System. Indeed, in this case, the Army relied upon its own violation of its regulations to assert personal jurisdiction over Schaefer after he had crossed the constitutional dividing line between soldier and civilian.

This Court has long emphasized that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures ... even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton*, 415 U.S. at 235; see also *Vitarelli*, 359 U.S. at 546-47 (Frankfurter, J., concurring) ("[I]f dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed."); *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945) (identifying the "[m]eticulous care" agencies must have in abiding by "procedural requirements prescribed for the protection of [an individual]").

The D.C. Circuit's adoption of a prejudice requirement in all circumstances—including those involving regulations that protect the rights of individuals—cannot be reconciled with this Court's

cases. This Court should grant the petition to resolve this conflict.

CONCLUSION

For these reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

No. 09-5187

MALCOLM G. SCHAEFER,
Appellant,

v.

JOHN MCHUGH, SECRETARY OF THE ARMY,
Appellee.

Argued April 20, 2010
Decided June 22, 2010

Before: GINSBURG, TATEL, and KAVANAUGH, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* KAVANAUGH.

KAVANAUGH, *Circuit Judge*:

Malcolm Schaefer pointed to his bad knees as a reason to get out of his Army service. But Schaefer was an Army lawyer. Bad knees typically do not preclude service as a lawyer. The Army therefore rejected Schaefer's request for discharge. But because of an administrative foul-up, Schaefer was able to obtain papers showing his legal discharge. Shortly afterwards, the Army informed Schaefer that he had to return to service. Schaefer did so, and the Army then took disciplinary action against him for his apparent shenanigans. In this litigation, Schaefer

argues, in essence, that he beat the system by obtaining papers showing his discharge and that subsequent Army disciplinary actions against him were invalid. The District Court rejected Schaefer's challenge, granting summary judgment to the Secretary of the Army. We affirm the judgment of the District Court.

I

The U.S. Army paid for Malcolm Schaefer's law school education in return for a six-year commitment to the Army. As of 2000, Schaefer was in the fourth year of his six-year active-duty service obligation. He was serving as an officer in the United States Army Judge Advocate General's Corps at Fort Benning, Georgia.

Beginning in late 2000, Schaefer sought a medical discharge from the Army because of injuries to his knees. He did so without informing anyone in his JAG Corps chain of command. Based on discharge orders issued in early July 2001, Schaefer was to be separated from the Army on September 14, 2001.

In late July 2001, the JAG Corps found out about Schaefer's pending separation—not because Schaefer informed his superiors, but because a JAG Corps employee happened to come across his discharge orders when updating records. Surprised to find that Schaefer was scheduled for medical separation—after all, Schaefer was a lawyer, and not in combat or in a non-combat position requiring significant physical activity—the JAG Corps took immediate action. The chief of the JAG Personnel Office informed the U.S. Army Physical Disability Agency (the entity within the Army that coordinates medical discharges) that Schaefer's medical problems would not impair his

ability to serve as a military lawyer. On August 14, 2001, the Army therefore revoked the authorization for Schaefer's discharge orders. The Army then issued a new medical determination deeming Schaefer fit for duty. The Army informed Schaefer of that determination on September 5, 2001. Schaefer's superiors also told him that his September discharge had been placed on hold.

Schaefer nonetheless showed up to obtain a discharge on Friday, September 14, 2001. Because of a paperwork foul-up, Schaefer was mistakenly issued a discharge certificate that day. Schaefer's chain of command learned of this the following Monday—September 17, 2001—when they came to work to find Schaefer's office empty.

The Army soon sent Schaefer a letter informing him that if he did not report back to Fort Benning, the Army would take steps to return him to military control. After failing to obtain a court injunction preventing the Army from taking action against him, Schaefer resumed work as a member of the JAG Corps. *See Schaefer v. White*, 174 F.Supp.2d 1374, 1384 (M.D.Ga.2001).

In the months following his return, the Army issued Schaefer both a highly critical Officer Evaluation and a Memorandum of Reprimand for wrongfully obtaining his discharge certificate. The Army also brought charges against Schaefer for obtaining a fraudulent discharge in violation of the Uniform Code of Military Justice. Rather than undergo trial by court-martial, Schaefer submitted a voluntary Resignation for the Good of the Service. As a result of his resignation, Schaefer left the Army on October 1, 2002.

Almost two years after his resignation, Schaefer filed a request with the Army Board for Correction of Military Records—the body authorized by the Secretary of the Army to correct Army personnel files—to have certain entries in his official military personnel file removed. *See* 10 U.S.C. § 1552(a)(1). As relevant here, Schaefer asked the Correction Board to (1) validate his September 2001 discharge, (2) nullify his October 2002 discharge, (3) expunge the adverse Officer Evaluation, Memorandum of Reprimand, and resignation from his record, and (4) stop the Army from recouping the severance pay he received in association with his 2001 medical discharge.

The Correction Board denied Schaefer's request. The Board concluded that Schaefer's September 14, 2001, discharge orders lacked legal effect because the authority to issue those orders had been revoked. The Board also concluded that Schaefer failed to show that his negative Officer Evaluation, Memorandum of Reprimand, or resignation should be removed from his military service record "to correct an error or remove an injustice." *Id.*

Schaefer then filed suit in U.S. District Court, arguing primarily that the Correction Board's decision was arbitrary, capricious, and contrary to law. The District Court granted summary judgment to the Secretary of the Army.

This Court reviews the District Court's grant of summary judgment *de novo*. The courts review the Correction Board's decision under the Administrative Procedure Act's arbitrary and capricious standard. *Kidwell v. Department of the Army*, 56 F.3d 279, 286 (D.C.Cir.1995). As a general matter, judicial review under that standard is deferential. When assessing a Correction Board decision, courts employ

an "unusually deferential application of the arbitrary or capricious standard." *Musengo v. White*, 286 F.3d 535, 538 (D.C.Cir.2002) (internal quotation marks omitted); *see Cone v. Caldera*, 223 F.3d 789, 793 (D.C.Cir.2000).

II

Schaefer asserts that he was validly discharged from the U.S. Army on September 14, 2001, and that the Correction Board should erase all traces of adverse action the Army took against him after that date. Relatedly, Schaefer argues that even if the Army did in fact revoke his September 14, 2001, discharge, the Army did not follow its own procedures in doing so. We will consider each argument in turn.

A

The Army Board for Correction of Military Records rejected Schaefer's claim that he was validly discharged from the Army on September 14, 2001. The Board's decision was reasonable and reasonably explained.

After thoroughly considering the facts of Schaefer's case, the Correction Board concluded that his September 14, 2001, discharge was "without legal effect because the authority to issue it had been revoked well before that date." J.A. 126. That finding comports with military court precedent establishing that "the mistaken delivery of a discharge certificate" which has "no legal effect" and which has "previously been revoked" does not "terminate" military service. *United States v. Garvin*, 26 M.J. 194, 194-96 (C.M.A. 1988). The issuing authority "must have intended the discharge to take effect" for that discharge to terminate service. *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F.2006).

Schaefer offers no persuasive grounds on which to second-guess the Correction Board's conclusion. The Board reasonably concluded that Schaefer was not lawfully discharged from the Army on September 14, 2001.

B

The Correction Board also rejected Schaefer's claim that Army procedures were not followed in revoking the authorization for his discharge.

Schaefer contends that the wrong Army entity revoked the authorization for his discharge—that one entity (the U.S. Army Physical Disability Agency) issued the order when another entity (the U.S. Total Army Personnel Command) had the sole authority to do so. The Correction Board reviewed the application of the relevant regulations in detail and concluded that the Army did not commit procedural error when it revoked the authorization for Schaefer's discharge. Moreover, the Board recognized that any de minimis violation of regulations when the Army revoked Schaefer's discharge did not harm Schaefer.

We agree with the Board's latter rationale and need not consider the former. A party claiming harm from an agency's failure to follow its own rules must demonstrate some form of prejudice. *See Battle v. FAA*, 393 F.3d 1330, 1336 (D.C.Cir.2005); *Steenholdt v. FAA*, 314 F.3d 633, 639-40 (D.C.Cir.2003). Schaefer was well aware that the Army had revoked the authorization for his discharge. He was also directly informed by his chain of command that his discharge was on hold. Schaefer failed to show that he suffered any prejudice from the Army's alleged error regarding which entity could technically revoke the authorization for his discharge.

C

In his brief, Schaefer also suggests that Article 3(b) of the Uniform Code of Military Justice is unconstitutional as applied to him. That provision states: "Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is . . . subject to trial by court-martial on that charge and is after apprehension subject to this chapter while in the custody of the armed forces for that trial." 10 U.S.C. § 803(b). That provision is not relevant here. Article 3(b) applies only to individuals who are actually "discharged from the armed forces" and then returned to the military to face court-martial. *Id.* As we have explained, Schaefer remained in the military until his voluntary resignation in 2002. Thus we need not consider the constitutionality of Article 3(b).

* * *

We affirm the judgment of the District Court.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA

Civil Case No. 07-1550 (RJL)

MALCOLM G. SCHAEFER,
Plaintiff,

v.

PETE GEREN, SECRETARY OF THE ARMY,
Defendant.

March 23, 2009

MEMORANDUM OPINION

Gary R. Myers, Gary Myers & Associates, Weare, NH, for Plaintiff.

Brian Christopher Baldrate, Gibson Dunn and Crutcher LLP, Lanny James Acosta, Jr., Daniel Franklin Van Horn, U.S. Attorney's Office, Washington, DC, Gary R. Myers, Gary Myers & Associates, Weare, NH, for Defendant.

RICHARD J. LEON, *District Judge*.

Malcolm Schaefer ("plaintiff"), a former U.S. Army officer, brings this action against Pete Geren ("defendant"), in his official capacity as Secretary of the Army, seeking to reverse the Army Board for Correction of Military Records' ("ABCMR") decision denying his request that certain records in his official military personnel file be altered or expunged. Before the

Court are plaintiff's and defendant's cross-motions for summary judgment. Because the ABCMR's decision was neither arbitrary, capricious, nor unlawful, plaintiff's motion for summary judgment is DENIED and defendant's motion for summary judgment is GRANTED.

BACKGROUND

In the fall of 2000, plaintiff was an active member of the U.S. Army Judge Advocate General's Corps ("JAG Corps") assigned to the Trial Defense Service field office at Fort Benning, Georgia. (Compl. ¶¶ 11, 13 [Dkt. # 1].) He had attended the University of Virginia School of Law at the Army's expense, graduating in 1996, and was serving a six-year active duty service obligation. (A.R. 226.) Due to the physical deterioration of his knees, plaintiff's physician referred him to an administrative screening board, known as a Medical/MSO Retention Board ("MMRB"), for evaluation of his ability to perform the physical requirements of his specialty in a worldwide field environment.[1] (A.R. 228); *see generally* Physical Performance Evaluation System, Army Reg. 600-60 ¶ 2-1 (Oct. 31, 1985).[2] On September 27, 2000, upon plaintiff's request, the MMRB Convening Authority referred plaintiff's case to a Medical Evaluation

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[1] Plaintiff was unable to run, parachute, walk long distances, march with a rucksack, or conduct other military activities that included impact on his knees. (Compl. ¶ 14.)

[2] Since the filing of the Complaint in this case on August 30, 2007, many of the regulations governing the relevant Army conduct have been revised. *E.g.*, Physical Performance Evaluation System, Army Reg. 600-60 (Feb. 28, 2008). For purposes of this decision, the Court references and applies the versions of the regulations that were in force at the time of the conduct at issue.

Board ("MEB") after finding that his "ability to satisfactorily perform [his] duties . . . is questionable." (A.R. 476, 492.) A MEB is the first step in the Army's Physical Disability Evaluation System ("PDES"), which determines whether a solider is unfit because of a physical disability to perform his or her duties and, as a result, should be discharged. *See generally* Physical Evaluation for Retention, Retirement, or Separation, Army Reg. 635-40 (Aug. 15, 1990).

On May 29, 2001, the MEB determined that plaintiff did not meet the medical qualifications for retention and referred his case to a Physical Evaluation Board ("PEB"), the second step in the PDES process.[3] (A.R. 496-500.) On June 11, 2001, the PEB at Fort Sam in Houston, Texas, determined that plaintiff was medically unfit and recommend he be separated from the Army with severance pay and a zero percent disability (the "first PEB"). (A.R. 96.) After plaintiff concurred with the findings, the PEB forwarded plaintiff's case to the U.S. Army Physical Disability Agency ("USAPDA") in Washington, DC—the third step in the PDES process—which reviewed the unopposed recommendation. (A.R. 97, 406, 750, 1235, 1705-06.) At USAPDA's direction, the Physical Disability Branch ("PDB") then used the TRANSPROC computer notification system to authorize the Fort Benning transition office to issue discharge orders—

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[3] MEBs are tasked with determining whether a solider is medically qualified for retention based on certain medical criteria. *See* Army Reg. 635-40 ¶ 4-10. PEBs subsequently evaluate the soldier's medical condition against the physical requirements of the soldier's particular office, grade, rank, or rating and make findings and recommendations as to the soldier's eligibility to be separated. *See id.* ¶ 4-17.

the fourth and final step in the process.[4] (A.R. 528, 750, 767, 772.) On July 2, 2001, Fort Benning printed Orders 183-2200, which ordered plaintiff to take certain preparatory actions and to appear at the transition point for processing on his appointed discharge date, September 14, 2001. (A.R. 98.)

During this process, plaintiff had taken care to keep his progression quiet from the JAG Corps.[5] In late July, however, an employee in the JAG Corps Personnel Plans & Training Office ("PPTO") discovered plaintiff's pending discharge while updating the office's database and, due to his surprise, contacted Dennis Brower, the legal advisor to USAPDA. (A.R. 449, 1236.) Upon his review, Brower determined that plaintiff's case file was deficient for lack of performance reviews from plaintiff's JAG Corps supervisors. (A.R. 449, 1238.) Brower asked Colonel Clyde Tate, chief of PPTO, whether the JAG Corps was interested in submitting performance information

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[4] The record indicates that "TRANSPROC is an electronic notification system that is an interoffice network connecting the [USAPDA] . . . with installation transition centers/points." (A.R. 750.)

[5] Only plaintiff's administrative commander—he commander of his local unit to which he was attached for administrative support—knew from the outset that plaintiff was being considered for a medical discharge, and plaintiff asked him to keep it confidential. (A.R. 408, 460.) Following the PEB's recommendation that he was unfit, plaintiff asked the PEB Liaison Officer "keep all of this quiet" out of concern that if his JAG supervisors found out, they would try to cancel the PEB and retain him on active duty. (A.R. 410.) Indeed, plaintiff did not inform anyone in his supervisory chain in the JAG Corps until after he received his discharge orders on July 2, 2001, and, even then, he asked those who he told to tell as few people as possible. (A.R. 413, 460.)

about plaintiff, to which Col. Tate answered it was. (A.R. 446.) The JAG Corps thereafter submitted several of plaintiff's officer evaluation reports and, on August 10, 2001, Col. Tate submitted a memorandum to USAPDA stating that he had reviewed medical facts in plaintiff's file and "conclude[d] with certainty that [plaintiff] can effectively perform his assigned duties as a judge advocate." (A.R. 517-18, 769.)

Based on the JAG Corps' assessment, Colonel Austin Bell, deputy commander of USAPDA, directed Brower to send the new information to the PEB in Texas to see if the PEB wanted to reconsider its previous findings, which it said it did. (A.R. 761, 769.) In addition, at Col. Bell's direction, PDB took steps to revoke the authorization to discharge plaintiff and to put his case "on hold." (A.R. 762, 769-770, 772.) On approximately August 2, 2001, PDB attempted to revoke the authorization in the TRANSPROC system; the system, however, was not working properly. (A.R. 444.) PDB accordingly contacted the Fort Benning transition point both by telephone and by facsimile to let them know that plaintiff was no longer authorized for separation and that PDB would make the appropriate change in TRANSPROC when it was again operational. (A.R. 442, 444, 947-48, 1563-64.) On approximately August 14, 2001, a PDB analyst again attempted to revoke the authorization in the TRANSPROC system, this time supposedly with success. (A.R. 444.)

On August 30, 2001, the PEB issued a new determination that plaintiff was, in fact, fit for continued active duty (the "second PEB"), which the Fort Benning PEB Liaison Officer ("PEBLO") communicated to plaintiff on September 5th. (A.R. 100-01.) Plaintiff did not concur with the finding. (*Id.*) The

PEBLO informed plaintiff that he had ten days in which to submit a written appeal, which plaintiff and the PEBLO agreed would be due Monday, September 17th. (A.R. 101, 406.) In response to plaintiff's comment during the meeting that he had discharge orders and was in the process of clearing, the PEBLO responded that his case was "on hold."[6] (A.R. 406.) On the advice of counsel, however, plaintiff nevertheless proceeded to move forward with his out-processing and, on September 14th, three days after the terrorist attacks of September 11, 2001, plaintiff appeared at the transition point and presented his July 2, 2001 discharge orders. (A.R. 326-27, 439.) Despite PDB's multiple attempts to effectuate the revocation of Fort Benning's authority to discharge plaintiff, the code in TRANSPROC authorizing plaintiff's discharge was inadvertently reentered into the system and the personnel clerk issued plaintiff a DD Form 214 discharge certificate. (A.R. 102,439, 1826-31.) Plaintiff subsequently left Fort Benning, his discharge certificate in hand.

The following Monday, September 17, 2001, the JAG Corps discovered plaintiff's empty office and contacted Brower at USAPDA. (A.R. 449, 471.) Brower responded that the authorization for plain-

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[6] Following plaintiff's meeting with the PEBLO, plaintiff told a colleague of his in the JAG Corps that he would not be discharged because the JAG Corps had stopped his medical board. (A.R. 462.) Plaintiff had also made similar comments prior to the PEB's formal "fit" determination. Following a conversation with Brower in which Brower informed plaintiff that his PEB determination was likely going to be reversed and that his case was on hold, plaintiff told both his subordinate and his supervisor that he would not be leaving the Army and that he intended to attend the JAG graduate course the following year. (A.R. 437, 449, 464.)

tiff's discharge had been revoked and that Fort Benning had no authority to separate him. (A.R. 449.) Having not received an appeal from plaintiff concerning his second PEB, USAPDA, through PDB, directed Fort Benning to issue a formal order revoking plaintiff's July 2nd discharge order, which Fort Benning did. (A.R. 104, 440, 449.) Fort Benning informed plaintiff later that day that his discharge orders had been revoked. (A.R. 441.)

The Army soon thereafter conducted an investigation into plaintiff's separation pursuant to Rule for Court-Martial 303. The investigation concluded that plaintiff's separation was invalid and he had knowingly and fraudulently procured his separation. (A.R. 12-16.) On October 29, 2001, the Army sent plaintiff a memorandum notifying him that it had concluded that he obtained an invalid separation and ordering him to report back to duty by November 5, 2001, else the Army would take "appropriate measures to return [him] to military control." (A.R. E105.) The Army also preferred a court-martial charge against plaintiff on November 1, 2001 for obtaining a fraudulent discharge in violation of Article 83 of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 883.[7] (A.R. 105.) The charge stated that plaintiff "on or about 14 September 2001, by means of knowingly presenting ORDERS 183-220 [sic] dated 01 July 2001 authorizing his release from active duty, when in fact he knew those orders were void,

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[7] Article 83 provides that "Any person who . . . (2) procures his own separation from the armed forces by knowingly false representation or deliberate concealment as to his eligibility for that separation . . . shall be punished as a court-martial may direct." 10 U.S.C. § 883.

procure himself to be separated from the U.S. Army." (*Id.*)

Plaintiff immediately filed a lawsuit in the Middle District of Georgia seeking a temporary restraining order and a preliminary injunction enjoining the Army from enforcing the October 29, 2001 orders and declaring that plaintiff was a civilian and not subject to military control. Plaintiff contended that he had received a valid discharge and that the Army could not assert jurisdiction over him either on the basis that his discharge was invalid or under Article 3(b) of the UCMJ, 10 U.S.C. § 803(b), which plaintiff contended was unconstitutional. Article 3(b) provides:

> Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is . . . subject to trial by court-martial on that charge and is after apprehension subject to this chapter while in the custody of the armed forces for that trial.

10 U.S.C. § 803(b). Judge Lawson denied plaintiff's motion on November 14, 2001, holding that Article 3(b) was constitutional, that the military therefore had jurisdiction to court-martial plaintiff for fraudulent separation, and that a military tribunal was the best forum for determining whether plaintiff's discharge was valid, given the military's relative competence and expertise in the subject. *Schaefer v. White*, 174 F.Supp.2d 1374, 1383-84 (M.D.Ga.2001).

Despite his continuing objection to the Army's jurisdiction, plaintiff thereafter returned to duty at Fort Benning and was assigned to work as a legal assistance attorney assisting service members and their families with a variety of legal issues. (A.R. 222.) In December 2001, the Army moved forward

with the court-martial and appointed a JAG attorney as an investigating officer (IO) for purpose of conducting an impartial investigation into plaintiff's separation and to make a non-binding recommendation concerning the charges, as required by Article 32 of the UCMJ, 10 U.S.C. § 832.[8] (A.R. 217.) The IO issued his report on January 15, 2002, concluding that plaintiff's conduct, while duplicitous and unbecoming of an officer, was not fraudulent because the bases for the discharge orders had not been overturned or revoked on September 14, 2001, when he presented himself for separation. (A.R. 107-14.) The Commanding General, however, nevertheless determined otherwise on the recommendation of his Staff Judge Advocate, pursuant to Article 34 of the UCMJ, 10 U.S.C. § 834, and referred the fraudulent separation charge to a general court-martial on March 1, 2002.[9]

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[8] Article 32(a) provides:

> No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

10 U.S.C. § 832(a).

[9] Article 34(a) provides:

> Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate for consideration and advice. The convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been advised in writing by the staff judge advocate that (1) the specification alleges an offense under this chapter; (2) the specification is warranted by the evidence indicated in the report of investigation under [Article 32] . . . ; and (3) a court-

(A.R. 219.) Rather than proceed with his defense to the general court-martial, set to begin trial June 17, 2002, plaintiff thereafter submitted a voluntary Resignation for the Good of the Service ("RFGOS") on May 27, 2002. (A.R. 733.) Plaintiff's RFGOS stated that it was conditioned on plaintiff receiving a "General under Honorable Conditions Discharge." (*Id.*) On June 3, 2002, the Commanding General issued plaintiff a General Officer Memorandum of Reprimand ("GOMOR"), which stated that plaintiff was being "reprimanded for wrongfully obtaining a [discharge certificate] when [he] fully knew that the basis for the issuance of [his] separation orders had been overturned." (A.R. 220-21.) The GOMOR recounted plaintiff's conduct surrounding his discharge, concluding that plaintiff "traded [his] integrity for selfish gain and in the process proved [himself] completely untrustworthy." (*Id.*) Plaintiff was also issued an adverse Officer Evaluation Report for the year preceding May 2002, which concluded that while plaintiff's work was "legally sufficient and generally satisfactory," he "did not perform at the level one would expect of a major" and "does not display any leadership skills nor Army values . . . as he is self-serving and puts himself over the mission." (A.R. 223.) Plaintiff received a second discharge certificate on October 1, 2002, discharging plaintiff from the Army. (A.R. 1014.)

On September 8, 2004, plaintiff applied to the ABCMR for relief pursuant to 10 U.S.C. § 1552.[10]

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martial would have jurisdiction over the accused and the offense.

10 U.S.C. § 834(a).

[10] 10 U.S.C. § 1552(a)(1) provides: "The Secretary of a military department may correct any military record of the Secretary's

Plaintiff requested that the ABCMR declare his October 2002 discharge certificate null and void, reissue plaintiff a discharge certificate stating that he was discharged on September 14, 2001, expunge from his military file his GOMOR, OER, and any references to his RFGOS, and stop the Army from its efforts to recoup the severance pay he received in September 2001. (A.R. 3.) In a 41-page decision, the ABCMR denied plaintiff's requests on November 8, 2005, concluding that: 1) plaintiff's first discharge was without legal effect and would not have been issued but for an "administrative snafu"; 2) the Army was justified in revoking his discharge orders and directing that he return to duty; 3) the Army was justified in preferring fraudulent separation charges against him; and 4) he failed to demonstrate that his GOMOR, his OER, and references to his RFGOS should be expunged from his file on account of error or injustice.[11] (A.R. 38-42.) Plaintiff thereafter filed this lawsuit on August 30, 2007, in which he alleges that the ABCMR acted arbitrarily, capriciously, and contrary to law in failing to award his requested relief. (Compl. ¶¶ 157-92.) Plaintiff also alleges that Article 3(b) is unconstitutional, both on its face and as applied to plaintiff. (Compl. ¶¶ 110-56.) Defendant moved for summary judgment on January 4, 2008 and plaintiff cross-moved for summary judgment on June 26, 2008.

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department when the Secretary considers it necessary to correct an error or remove an injustice."

[11] The ABCMR also noted that it agreed with the case law holding Article 3(b) of the UCMJ constitutional, citing *Wickham v. Hall*, 12 M.J. 145 (CMA 1981) and *Schaefer*, 174 F.Supp.2d at 1374. (A.R. 42.)

DISCUSSION

I. Legal Standard

A. Legal Standard for Summary Judgment

Summary judgment should be rendered if the pleadings and the record "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The burden of establishing that there is no genuine issue of material fact is on the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The Court must view the facts in the light most favorable to the nonmovant, giving the nonmovant the benefit of all justifiable inferences derived from the evidence. *Id.* at 255, 106 S.Ct. 2505. The nonmovant, however, may not rely merely on allegations, conclusory statements, or denials in its own pleading, but must set out specific facts that would enable a reasonable jury to find in its favor. Fed.R.Civ.P. 56(e); Greene *v. Dalton*, 164 F.3d 671, 675 (D.C.Cir.1999).

B. Legal Standard for Review of ABCMR Decisions

Judicial review of ABCMR decisions issued pursuant to 10 U.S.C. § 1552 is authorized under the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 701, *et seq.*; *Piersall v. Winter*, 435 F.3d 319, 324 (D.C.Cir.2006). Under the APA, a Court may only set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). To prevail, a plaintiff

must provide "cogent and clearly convincing evidence" satisfying this standard, *Mueller v. England*, 404 F.Supp.2d 51, 55 (D.D.C.2005), and must "overcome the 'strong, but rebuttable, presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully, and in good faith,'" *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C.Cir.1997) (quoting *Collins v. United States*, 24 Cl.Ct. 32, 38 (1991)). In addition, as to those aspects of the ABCMR's decision that "rel[y] on a broad delegation from Congress of discretion to use its inherent judgment to assess the merits of an application, the court . . . appl[ies] an especially deferential standard of review." *Epstein v. Geren*, 539 F.Supp.2d 267, 275 (D.D.C.2008) (citing *Cone v. Caldera*, 223 F.3d 789, 793 (D.C.Cir.2000)). The Court must "determine only whether the Secretary's decision making process was deficient, not whether his decision was correct." *Kreis v. Sec'y of the Air Force*, 866 F.2d 1508, 1511 (D.C.Cir.1989). Indeed, "the function of [the Court] is not to serve as a super correction board that reweighs the evidence." *Charette v. Walker*, 996 F.Supp. 43, 50 (D.D.C.1998).

II. Analysis

A. Validity of the First Discharge

Plaintiff contends that the ABCMR acted arbitrarily, capriciously, and contrary to law by allowing the Army to violate its own regulations governing the reconsideration of a medical discharge and, in turn, in determining that the September 14, 2001 discharge was without legal effect. (Tr. of Mot. Hr'g at 10-11, Aug. 19, 2008.) If the Court agrees, plaintiff contends, the Court must find the second discharge, the OER, and the GOMOR null and void because there is no indication of fraud in the record and

therefore the Army was without jurisdiction over the plaintiff after September 14, 2001. (*Id.* at 18.) Defendant contends, conversely, that the ABCMR did not act arbitrarily, capriciously, or contrary to law in determining that plaintiff's alleged first discharge on September 14, 2001 was a legal nullity and that the Army's actions thereafter were justified. (Def.'s Mot. for Summ. J. at 7-11 [Dkt. # 10].) For the following reasons, I agree.

Plaintiff's threshold attack on the ABCMR decision is that he received a facially valid discharge certificate based on orders that were not revoked until after his discharge and, therefore, under *Smith v. Vanderbush*, 47 M.J. 56 (C.A.A.F.1997), the Army—not plaintiff—must bear the cost of the Army's "administrative snafu" involving TRANSPROC. (Pl.'s Cross-Mot. for Summ. J. at 3-9 [Dkt. # 42].) As noted by Judge Lawson, however, *Vanderbush* did not involve a discharge of questionable validity. *Schaefer*, 174 F.Supp.2d at 1380. In *Vanderbush*, the Army intended, but failed, to "flag" the soldier's file, which would have suspended any favorable personnel actions, and defendant received a discharge based on the expiration of his term of service. *Vanderbush*, 47 M.J. at 57. The U.S. Court of Appeals for the Armed Forces held that the Army could not assert continuing jurisdiction over the discharged soldier in order to court-martial him, despite the administrative error, because the defendant had received a discharge for which the underlying basis was valid: namely, his duty obligation had ended. *Id.* at 60-61; *see also U.S. v. Howard*, 20 M.J. 353, 354-55 (C.M.A.1985) (no continuing jurisdiction over soldier where "commander made an informed decision to allow appellant to be discharged" and only later attempted to revoke the discharge in order to court-martial him). Here, by

contrast, USAPDA revoked the authority for plaintiff's discharge well before September 14, 2001. When the underlying authority for the discharge is timely revoked, an error in delivering a discharge certificate does not effectuate a *valid* discharge. *See U.S. v. Williams*, 53 M.J. 316, 317 (C.A.A.F.2000) (facially valid discharge certificate was properly revoked when military placed legal hold on soldier hours prior to delivery of the discharge certificate); *U.S. v. Garvin*, 26 M.J. 194, 195-96 (C.M.A.1988) (where discharge authority revoked discharge orders prior to delivery "the mistaken delivery of [the] discharge certificate . . . was not accomplished with the intent required to effect a valid discharge"); *see also U.S. v. Harmon*, 63 M.J. 98, 101 (C.A.A.F.2006) ("the discharge authority must have intended the discharge to take effect" in order for the delivery of the discharge certificate to terminate military jurisdiction). Accordingly, the ABCMR was not arbitrary, capricious, or contrary to law in determining that plaintiff's first discharge was "without legal effect," (A.R. 40), based on the USAPDA's revocation of the authority to issue the discharge prior to plaintiff's receipt of the discharge certificate.

Plaintiff's second attack centers on his interpretation of Army Regulation 635-40, which governs the PDES process. Notwithstanding the regulation's complexity, plaintiff contends that the regulation sets forth a clear division of labor between USAPDA and U.S. Total Army Personnel Command ("PERSCOM"). While USAPDA is responsible for making the final decisions concerning whether a soldier is unfit for duty, PERSCOM is responsible for effecting final

disposition after it receives USAPDA's decision.[12] Included in that division of labor, plaintiff contends, are material limitations on USAPDA's authority to reconsider cases in which discharge orders have been issued by PERSCOM such that USAPDA's *sua sponte* reconsideration of plaintiff's case, without having received it back from PERSCOM, rendered void both the PEB's reconsideration and USAPDA's revocation of Fort Benning's authority to discharge plaintiff. Therefore, plaintiff contends, his discharge on September 14, 2001 was, in fact, valid and the ABCMR was arbitrary, capricious, and contrary to law to find otherwise. (Pl.'s Cross-Mot. for Summ. J. at 13-27.) I disagree.

The record reflects that at some time prior to 2001, the PERSCOM office responsible for accomplishing final administrative actions in the PDES process—the Physical Disability Branch ("PDB")—physically moved from PERSCOM to Walter Reed Army Medical Center, the location of USAPDA. (A.R. 251, 274, 1549, 1566.) As a result, PDB became, in effect, an adjunct of USAPDA. Rather than fax USAPDA's final decisions to PDB for final disposition, as it had previously done, USAPDA was able to walk down the

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[12] Chapter 2 of the regulation, entitled "Responsibilities and Functions," provides that PERSCOM will, among other things, "(a) Operate the [PDES] . . . [and] (b) Accomplish final administrative actions in processing physical disability cases; issue needed orders or other instructions for the [Secretary of the Army], based on decisions of [USAPDA]." Army Reg. 635-40 ¶ 2-3(a)-(b). In contrast, the chapter provides that USAPDA, "under the operational control of [PERSCOM]," will, among other things, "operate the [PDES], to include . . . (b) Developing the policies, procedures, and programs of the system . . . [and] (f) Making the final decision whether a solider is unfit because of physical disability." *Id.* ¶ 2-4(b), (f).

hall and instruct PDB to transmit the appropriate instructions, via the TRANSPROC system, to the appropriate installation. (A.R. 274, 1557-58.) Thus, when USAPDA approved the PEB's first finding that plaintiff was unfit, USAPDA, without ever contacting PERSCOM's headquarters, instructed PDB to transmit the necessary authorization to Fort Benning for it to issue plaintiff's July 2, 2001 discharge orders. (A.R. 444.) And similarly, when USAPDA received the JAG Corps' assessment of plaintiff's physical capabilities in early August 2001, it instructed PDB to revoke the authorization to discharge plaintiff, again without contacting PERSCOM's headquarters.[13] (A.R. 255, 444.)

It is well-settled that federal agencies, including the Army, are required to follow their own rules and regulations. *Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C.Cir.2003) (construing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954)); *see also Martin v. Sec'y of Army*, 455 F.Supp. 634, 638 (D.D.C.1977) ("It is established beyond peradventure that the military, like any other agency, is bound by its own regulations."). Contrary to plaintiff's contentions, however, the ABCMR's decision did not overtly or implicitly bless a violation of the Army's own regulations. Rather, the ABCMR found, after an extensive review of the facts and relevant regulations, that the USAPDA was within its authority under the regulation to return plaintiff's case to the PEB for reconsideration and that, as a

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[13] Col. Bell, who was deputy commander for USAPDA at the time and had final authority over its day-to-day operations, testified during the Middle District of Georgia action that as a result of PDB's move to USAPDA, he was both USAPDA and PERSCOM. (A.R. 250, 251.)

result, the second PEB obviated the first and the first discharge lacked validity because the authority underlying the discharge had been revoked. (A.R. 38-40.) According the ABCMR the due deference it is owed and recognizing the military's relative expertise in interpreting military regulations and procedures, *see Lawrence v. McCarthy*, 344 F.3d 467, 473-74 (5th Cir. 2003), this Court does not find the ABCMR's interpretation arbitrary, capricious, or otherwise not in accordance with law.

It is clear from the ABCMR's 41-page memorandum decision that it considered both the structure and the specific provisions of Army Regulation 635-40, as well as plaintiff's proffered interpretation. (A.R. 8-9, 33-35, 38-39.) The ABCMR determined that "the authority to act upon PEB proceedings for the Secretary of the Army rests with the PEB itself, or as in this case, the USAPDA" and that "[c]ounsel's argument that [plaintiff's] case could not be reconsidered by PEB or the USAPDA until after they received the case back from PERSCOM is without merit." (A.R. 38.) Noting that while the "regulation . . . is outdated" and "the functions of PERSCOM in this respect have been assumed by the [PDB]," the ABCMR found that "the first PEB finding never went to PERSCOM, and so the requirement for PERSCOM to authorize reconsideration was not triggered, contrary to [plaintiff's] claim." (*Id.*)

The ABCMR's interpretation is sufficiently supported by the regulation and the regulation's implementation in practice to withstand review. The regulation makes clear that USAPDA is the final decision-making authority in the PDES process, the authority responsible for reviewing PEB proceedings and findings, and the authority responsible for

"developing the policies, procedures, and programs of the system." Army Reg. 635-40 ¶ 2-4(b), (e), (f). PERSCOM, by contrast, is tasked with the purely ministerial role of issuing orders or disposition instructions "[b]ased on the final decision of USAPDA." *Id.* 14-24(b); *see also id.* ¶ 2-3(b) (PERSCOM will "[a]ccomplish final administrative actions in processing physical disability cases; issue needed orders or other instructions . . . based on the decisions of [USAPDA]"). While USAPDA operates formally under the PERSCOM umbrella, *id.* ¶ 2-3, USAPDA has day-to-day responsibility for overseeing the PDES process and for acting on PEB proceedings. For example, USAPDA—not PERSCOM—is responsible for reviewing case records to ensure the findings are "just, equitable, consistent with the facts, and in keeping with the provisions of law and regulations," *id.* ¶ 4-22(b)(3), and USAPDA—not PERSCOM—is responsible for returning cases to PEB when "case records show such action is in the best interests of the solider or the Army," *id.* ¶ 4-22(c)(2).

USAPDA's authority in this regard is born out by record. Even prior to PDB's physical relocation from PERSCOM to USAPDA's office at Walter Reed, PDB effected and revoked final dispositions at USAPDA's direction, without independent review on PERSCOM's part. (A.R. 1566-67.) PDB, consistent with the ministerial role given PERSCOM in the regulation, merely took the actions necessary to implement USAPDA's decisions, including whether to recall certain cases. (*Id.*)

PDB's practice in this respect is at least equally as consistent with the regulation as plaintiff's interpretation. Plaintiff relies heavily on paragraph 4-24 and

Appendix paragraph E-9(e) of the regulation, which state, respectively:

> 4-24. Disposition by PERSCOM
>
> PERSCOM will dispose of the case by publishing orders or issuing proper instructions to subordinate headquarters, or return any disability evaluation case to USAPDA for clarification or reconsideration when newly discovered evidence becomes available and is not reflected in the findings and recommendations.
>
> and
>
> E-9. Final disposition instructions.
>
> *e. Requests for exception to established discharge or retirement date.* Request for deviation from established discharge date or amendment or revocation of retirement orders for other than medical reasons will be submitted, with justification, to PERSCOM ([Physical Disability Branch]) . . . . USAPDA will decide whether the case should be reconsidered by the PEB. USAPDA may request PERSCOM cancel discharge instructtions, or amend or revoke retirement orders.

Army Reg. 635-40 ¶¶ 4-24, App. E-9(e). While plaintiff argues that these provisions require that PERSCOM review each case in which discharge orders have been issued to determine if the new evidence warrants reconsideration, neither provision explicitly gives PERSCOM such an affirmative role. Rather, both indicate that it is USAPDA that has the decision-making role, while PERSCOM is tasked only with formally returning the case to USAPDA or canceling discharge orders at USAPDA's request. The ABCMR's decision that USAPDA was within its

authority to reconsider plaintiff's case and revoke the authority for his discharge is thus neither arbitrary, capricious, nor contrary to law.

Moreover, and perhaps most critically, plaintiff's interpretation of PERSCOM's role in the PDES process does not square with the conclusion that he contends this Court should reach: namely, that his first discharge was valid. Plaintiff's first PEB finding, which resulted in his July 2, 2001 discharge orders, never went to or through PERSCOM, but rather, went from USAPDA to the Fort Benning transition point via PDB. (A.R. 444.) Accordingly, if the second PEB and USAPDA's revocation of authority to discharge plaintiff were invalid due to USAPDA's failure to request plaintiff's case back from PERSCOM, as plaintiff contends, so too were plaintiff's first discharge orders invalid due to USAPDA's failure to send plaintiff's case to PERSCOM for final disposition. In short, plaintiff's argument is one of form over substance on steroids!

Accordingly, I do not find the ABCMR's decision that USAPDA and the PEB had the authority to reconsider plaintiff's case arbitrary, capricious, or contrary to law. I also do not find arbitrary, capricious, or contrary to law the ABCMR's related conclusions that the second PEB's reconsideration obviated the first PEB's findings and that USAPDA effectively revoked the authority for the September 14, 2001 discharge before that date. (A.R. 39-40.) Indeed, the form transmitting the second PEB's "fit" determination, which plaintiff reviewed and signed, stated on its face that the PEB's first determination was super-

seded.[14] (A.R. 100, 406.) And while the second PEB's findings were not yet final until after the period for plaintiff's filing of an appeal ran, on September 17, 2001, the record reflects that if the clerk at the Fort Benning transition point had remembered that the authorization for plaintiff's discharge had been revoked, she would not have given plaintiff a discharge certificate. (A.R. 439.) The ABCMR, therefore, was not arbitrary, capricious, or contrary to law to determine that plaintiff's September 14, 2001 discharge was a legal nullity and that the Army's formal revocation of his discharge orders and order that plaintiff return to duty were justified. (A.R. 40); *Garvin*, 26 M.J. at 195-96.

B. Plaintiff's Remaining Claims

Plaintiff also asserts facial and as-applied challenges to the constitutionality of Article 3(b) of the UCMJ, 10 U.S.C. § 803(b).[15] Plaintiff, however, lacks standing to do so. "To have Article III standing, a plaintiff must demonstrate an 'actual or immediate' 'injury-in-fact' that is 'fairly traceable' to the challenged conduct and 'likely' to be 'redressed by a favorable decision.'" *Tozzi v. U.S. Dep't of Health &*

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[14] Indeed, paragraph 4-19(p)(1) of Army Regulation 635-40 provides that "[w]hen new findings are made by the PEB, they become the only findings on which later action will be taken." Army Reg. 635-40 ¶ 4-19(p)(1).

[15] Plaintiff's Article 3(b) challenge is essentially a reassertion of the arguments he presented to the Middle District of Georgia in support of his motion for a temporary restraining order and preliminary injunction, which was denied. *See Schaefer*, 174 F.Supp.2d at 1382-83. Plaintiff's challenge differs in this case only in that plaintiff adds related as-applied challenges to the constitutionality of Articles 32 and 34 of the UCMJ, 10 U.S.C. §§ 832, 834.

Human Servs., 271 F.3d 301, 307 (D.C.Cir.2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Here, plaintiff chose to voluntarily resign from the Army in October 2002 rather than proceed with his defense to the court-martial proceeding that was then pending. Accordingly, even if the Court were to declare Article 3(b) unconstitutional, as plaintiff requests, such a declaration would not redress any injury plaintiff alleges he has suffered. *See Miller v. Roche*, No. 03-1742, 2006 WL 326006, *3-4 (D.D.C. Feb. 10, 2006). Such a declaration would not invalidate his October 2002 discharge or lead this Court to order that his military file be expunged of all materials related to events after September 14, 2001, because this Court has already held above that the ABCMR's decision that plaintiff's first discharge was a legal nullity was neither arbitrary, capricious, nor contrary to law.[16] Accordingly, because I can issue no order that would redress plaintiff's alleged injury, he lacks standing to pursue his constitutional claims.

Finally, the Court finds no reason to overturn the ABCMR's refusal to remove from plaintiff's official military file his 2001-2002 OER, June 2002 GOMOR, or references to his RFGOS. Beyond alleging that the Army lacked jurisdiction over plaintiff to issue these documents, plaintiff provides no basis on which to find the ABCMR's decision arbitrary or capricious. Moreover, in this area courts must give the ABCMR "an unusually deferential application of the 'arbitrary

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[16] Nevertheless, even if I had jurisdiction to consider plaintiff's constitutional challenges, I see no reason to deviate from Judge Lawson's earlier determination that Article 3(b) is constitutional. *Schaefer*, 174 F.Supp.2d at 1382-83 (citing *United States v. Cole*, 24 M.J. 18, 22 (CMA 1987)).

and capricious' standard' of the APA." *Kreis*, 866 F.2d at 1514. Here again, the ABCMR's decision contains an extensive review of the facts and provides explicit reasons for denying plaintiff's requested relief. (A.R. 40-41); *Kreis*, 866 F.2d at 1514-15 (the Army "must give a reason that a court can measure, albeit with all due deference, against the 'arbitrary and capricious' standard of the APA"). The ABCMR neither failed to consider any of plaintiff's arguments nor issued a decision as to any of the documents that was arbitrary or capricious.

CONCLUSION

Thus, for all of the above reasons, the Court GRANTS defendant's Motion for Summary Judgment and DENIES plaintiff's Cross-Motion for Summary Judgment. An appropriate Order will issue with this Memorandum Opinion.

APPENDIX D

Chapter 1
Introduction

1–1. Purpose

This regulation establishes the Army Physical Disability Evaluation System according to the provisions of chapter 61, title 10, United States Code (10 USC 61) and Department of Defense Directive (DODD) 1332.18. It sets forth policies, responsibilities, and procedures that apply in determining whether a soldier is unfit because of physical disability to reasonably perform the duties of his or her office, grade, rank, or rating. If a soldier is found unfit because of physical disability, this regulation provides for disposition of the soldier according to applicable laws and regulations. The objectives of this regulation are to—

a. Maintain an effective and fit military organization with maximum use of available manpower.

b. Provide benefits for eligible soldiers whose military service is terminated because of a service-connected disability.

c. Provide prompt disability processing while ensuring that the rights and interests of the Government and the soldier are protected.

1–2. References

Required and related publications are listed in appendix A. Prescribed and referenced forms are also listed in appendix A.

1–3. Explanation of abbreviations and terms

Abbreviations and special terms used in this regulation are explained in the glossary.

1–4. Ineligibility for processing

a. Section 1217, title 10, United States Code (10 USC 1217) excludes cadets of service academies from eligibility for disability benefits under 10 USC 61. However, USMA cadets may be entitled to compensation administered by the Department of Veterans Affairs (VA). Section 101(21)(D), title 38, United States Code (38 USC 101(21)(D)) includes service as a cadet at the United States Military Academy (USMA) within the definition of active duty for purposes of entitlement to VA compensation.

b. Reserve Officers' Training Corps (ROTC) cadets are not eligible for processing under this regulation. Senior ROTC cadets may be eligible for VA disability benefits under section 101(22)(D), title 38, United States Code (38 USC 101(22)(D)) as explained above for USMA cadets.

Chapter 2
Responsibilities and Functions

Section I
Responsible Individuals

2–1. Secretary of the Army (SA)

The SA will prescribe regulations to carry out the provisions of 10 USC 61.Unless otherwise specified in this regulation, the SA reserves all powers, functions, and duties of the Army Physical Disability Evaluation System.

2–2. Deputy Chief of Staff for Personnel (DCSPER)

The DCSPER has overall Army Staff responsibility for the Army Physical Disability Evaluation System. Policy guidance will be provided by the Director of

Military Personnel Management (DMPM), Office of the Deputy Chief of Staff for Personnel (ODCSPER).

2–3. Commander, U.S. Total Army Personnel Command (Commander PERSCOM)

The commander, PERSCOM will—

a. Operate the Army Physical Disability Evaluation System under the general staff supervision of the DCSPER.

b. Accomplish final administrative actions in processing physical disability cases; issue needed orders or other instructions for the SA, based on decisions of the Commanding General, U.S. Army Physical Disability Agency(CG, USAPDA) or higher authority (chap 4 and app E).

c. Notify the VA of all individuals being separated or retired from the Army for physical disability.

d. Coordinate, control, and manage all soldiers on the Temporary Disability Retired List (TDRL)

2–4. CG, USAPDA

The CG, USAPDA, under the operational control of the Commander, PERSCOM, will operate the Army Physical Disability Evaluation System, to include—

a. Interpreting and implementing policies coming from higher authority.

b. Developing the policies, procedures, and programs of the system.

c. Coordinating with other military departments to ensure applicable laws, policies, and directives are interpreted uniformly. (A uniform interpretation is required to ensure that a soldier of the Army will be

granted substantially the same benefits as a member of another Service under similar conditions.)

d. Commanding and managing the subordinate elements of the USAPDA.

e. Reviewing Physical Evaluation Board (PEB) proceedings to ensure that soldiers are given uniform and fair consideration under applicable laws, policies, and directives.

f. Making the final decision whether a soldier is unfit because of physical disability except when such decisions are reserved to higher authority. Included as higher authority are the Office of the Secretary of the Army (OSA) and the Office of the Secretary of Defense (OSD).

g. Determining percentage rating and disposition.

2–5. The Surgeon General (TSG)

TSG will establish and interpret medical standards for retaining soldiers on active duty (see AR 40–3 and AR 40–501).

2–6. The Judge Advocate General (TJAG)

The TJAG will—

a. Interpret laws and regulations governing the Army Physical Disability Evaluation System.

b. Train and provide sufficient legal counsel to represent soldiers appearing before a PEB.

c. Train Army attorneys in disability law.

2–7. Commanding Generals of Health Services Command (HSC); 7th Medical Command/ Europe (7 MEDCOM/EUR); and 18th Medical Command (18 MEDCOM)

The commanding generals of the Health Services Command (HSC); the 7th Medical Command/Europe

(7 MEDCOM/EUR); and the 19 Medical Command (19 MEDCOM) will—

a. Ensure that Army medical treatment facilities (MTFs) under their control fulfill their responsibilities in connection with the Army Physical Disability Evaluation System as outlined in AR 40–3 and this regulation.

b. Appoint MTFs responsible for accomplishing periodic medical evaluation for TDRL members (chap 7).

2–8. Commander, MTF

The commander, MTF will—

a. Provide a thorough and prompt evaluation when a soldier's medical condition becomes questionable in respect to physical ability to perform duty.

b. Appoint a Physical Evaluation Board Liaison officer (PEBLO) to counsel soldiers undergoing physical disability processing.

c. Ensure medical evaluation board (MEBD) proceedings referred to the PEB are complete, accurate, and fully documented as outlined in AR 40–3, chapter 7, and chapter 4 of this regulation.

2–9. Unit commander

The unit commander will—

a. Become thoroughly familiar with the purpose of the Army Physical Disability Evaluation System.

b. Ensure that any physical defects impacting on a soldier's performance of duty are reflected in the soldier's evaluation report.

c. Refer a soldier to the servicing MTF for medical evaluation when the soldier is believed to be

unable to perform the duties of his or her office, grade, rank, or rating.

d. Upon request of the MTF commander, provide the information, statements, and records on soldiers of their command being processed for physical disability evaluation.

e. Ensure timely compliance with AR 600–8–1 to prevent delay in the disability processing of soldiers under their command.

Section II
Related Boards

2–10. Board Elements

a. The Army Physical Disability Evaluation System consists of—

(1) MEBDs (a function of the Army Medical Department).

(2) PEBs (elements of the USAPDA).

(3) Case reviews, when applicable, by USAPDA.

b. Certain Department of the Army (DA) boards, though not a part of the disability system, are closely related to disability evaluation because of their assigned function to review disability decisions upon request of the soldier, former soldier, or when otherwise required. These boards are described in paragraphs 2–11 through 2–13 below.

2–11. Army Physical Disability Appeal Board (APDAB)

The APDAB is a component of the Army Council of Review Boards (ACRB). APDAB was established to review disability evaluation cases forwarded by the

CG, USAPDA as provided under the circumstances prescribed in chapter 4.

2–12. The Army Board for Correction of Military Records (ABCMR)

The ABCMR is a statutory board established within the OSA under the provisions of section 1552, title 10, (10 USC 1552). The ABCMR provides a means for correcting an error or removing an injustice. Within 3 years of the first knowledge of an error or injustice, a soldier, former soldier, or individual acting on the soldier's behalf may submit an application to the ABCMR according to AR 15–185 if the individual—

a. Believes that his or her military records reflect an error or an injustice.

b. Has exhausted all administrative remedies offered by existing laws and regulations.

2–13. Army Disability Rating Review Board (ADRRB)

The ADRRB is a component of the Army Council of Review Boards (ACRB). The ADRRB reviews disability percentage ratings on request of a soldier who was retired because of physical disability (chap 4, sec VI). Requests for review must be made within 5 years from the date of retirement.

Chapter 3
Policies

3–1. Standards of unfitness because of physical disability

The mere presences of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability

present with the requirements of the duties the soldier reasonably may be expected to perform because of his or her office, grade, rank, or rating.

a. Objectives of standards. To ensure all soldiers are physically qualified to perform their duties in a reasonable manner, medical retention qualification standards have been established in AR 40–501, chapter 3. These standards include guidelines for applying them to fitness decisions in individual cases. These guidelines are used to refer soldiers to a MEBD. The major objective of these standards is to achieve uniform disposition of cases arising under the law. These retention standards and guidelines should not be interpreted to mean that possessing one or more of the listed conditions or physical defects signifies automatic disability retirement or separation from the Army. The fact that the soldier has one or more defects sufficient to require referral for evaluation, or that these defects may be unfitting for soldiers in a different office, grade, rank, or rating, does not justify a decision of physical unfitness.

b. Considering the overall effect of disabilities. The overall effect of all disabilities present in a soldier whose physical fitness is under evaluation must be considered. The effect will be considered both from the standpoint of how the disabilities affect the soldier's performance and the requirements imposed on the Army to maintain and protect him or her during future duty assignments. A soldier may be unfit because of physical disability caused by a single impairment or physical disabilities resulting from the overall effect of two or more impairments even though each of them, alone, would not cause unfitness.

c. Evaluating the soldier's fitness to perform duties. All relevant evidence must be considered in

evaluating the fitness of a soldier. Findings with respect to fitness or unfitness for military service will be made on the basis of the preponderance of the evidence. Thus, if the preponderance of evidence indicates unfitness, a finding to that effect will be made. For example, when a referral for physical evaluation immediately follows acute, grave illness or injury, the medical evaluation may have the greater weight. This is particularly true if medical evidence establishes the fact that continued service would be harmful to the soldier's health or would prejudice the best interests of the Army. A soldier may be referred for physical evaluation under other circumstances. If so, evaluations of the performance of duty by supervisors (letters, efficiency reports, or personal testimony) may provide better evidence than a clinical estimate by the soldier's physician describing the physical ability to perform the duties of the office, grade, rank, or rating. Thus, if the evidence establishes the fact that the soldier adequately performed the normal duties of his or her office, grade, rank, or rating until the time of referral for physical evaluation, the soldier might be considered fit for duty. This is true even though medical evidence indicates the soldier's physical ability to perform such duties may be questionable. However, inadequate duty performance should not be considered as evidence of physical unfitness unless a cause and effect relationship exists between the inadequate duty performance and the presence of physical disabilities.

d. Deciding the soldier's unfitness to perform duties. Initial enlistment, induction, or commissioning physical standards are not relevant to deciding unfitness for continued military service. Once a soldier has been enlisted, inducted, or commissioned, the fact that the soldier may later fall below initial

entry physical standards does not, in itself, authorize separation or retirement unless it is also established that the soldier is unfit because of physical disability as described above. Likewise, a lack of special skills in demand, inability to meet physical standards established for specialized duty such as flying, or transfer between components or branches within the Army, does not, in itself, establish eligibility for disability separation or retirement. Although the ability of a soldier to reasonably perform his or her duties in all geographic locations under all conceivable circumstances is a key to maintaining an effective and fit force, this criterion (world-wide deployability) will not serve as the sole basis for a finding of unfitness.

e. Prior-service disabilities. Prior-service medical conditions are to be considered according to the following standards and limitations.

(1) Despite any other provisions of this regulation, after a soldier has been enlisted, inducted, and appointed or commissioned, the soldier will not be declared physically unfit for military service because of disabilities known to exist at the time of the soldier's acceptance for military service that have remained essentially the same in degree since acceptance, and have not interfered with the soldier's performance of effective military service.

f. At the time of final retirement or separation, the soldier will be referred to a MEBD and PEB (para 6–14).

3–11. Limitation on appearance by soldiers

A soldier or his or her representative will not be permitted to appear before the informal PEB, USAPDA (during case review), the APDAB, or the ADRRB.

3–12. Findings and recommendations of agencies reviewing disability cases

Review and appeal activities are bound by the regulations under which adjudicative activities function. A rare and unusual case may occur to which current regulations do not apply. If so, refer the case through channels to the OSA with a recommendation for disposition.

3–13. Special rules applicable to general and medical corps officers

a. General officers and medical corps officers will not be found to be unfit by reason of physical disability if they can be expected to perform satisfactorily in an assignment appropriate to their grade, qualifications, and experience.

b. General officers and medical corps officers who are processing for retirement by reason of age or length of service may not be retired for physical disability unless the initial unfitness determination of the SA is approved by the Secretary of Defense on the recommendation of the Assistant Secretary of Defense (Health Affairs) (ASD(HA)).

c. General officers and medical corps officers not processing for retirement by reason of length of service at the time of their referral into the disability system, may not be retired or separated for physical disability until a recommendation therefore by the SA is approved by the ASD(HA).

d. One copy of all retirement orders issued in the case of general officers retired because of physical disability will be submitted to ASD(HA).

3–14. Factors governing time of processing

The point in time for referral of a soldier for disability separation or retirement is determined on an individ-

ual basis. Normally, soldiers who are not likely to return to duty will be processed as soon as this probability is ascertained.

a. Separation or retirement should normally occur within 20 days of the date of the final determination of unfitness by the SA. However, soldiers are entitled to use accrued leave in excess of that which cannot be sold back to the Government.

b. Soldiers having a prognosis of imminent death shall be evaluated and processed in a comparable manner and procedural sequence to that of all other soldiers. No procedures will be circumvented or omitted, to include LD determination in the interest of timely processing.

Chapter 4
Procedures

Section I
Eligibility for Disability Evaluation

4–1. Soldiers charged with an offense

a. Uniform Code of Military Justice (UCMJ) action. The case of a soldier charged with an offense under the UCMJ or who is under investigation for an offense chargeable under the UCMJ which could result in dismissal or punitive discharge, may not be referred for, or continue, disability processing unless—

(1) The investigation ends without charges.

(2) The officer exercising proper court-martial jurisdiction dismisses the charges.

(3) The officer exercising proper court-martial jurisdiction refers the charge for trial to a court-martial that cannot adjudge such a sentence.

b. Civil court action. If civil criminal court action is pending and the soldier is present for duty, disability processing continues provided any movement of the soldier is cleared with responsible military and civilian authorities.

4–2. Soldiers with suspended sentences

A soldier may not be referred for, or continue, disability processing if under sentence of dismissal or punitive discharge. If the sentence is suspended, the soldier's case may then be referred for disability processing. A copy of the order suspending the sentence must be included in the soldier's records. If action to vacate the suspension is started after the case is forwarded for disability processing, the PEB serving the area must be promptly notified to stop disability processing. Disability processing may resume if the commander decides not to vacate the suspension.

4–3. Enlisted soldiers subject to administrative separation

a. Except as provided below, an enlisted soldier may not be referred for, or continue, physical disability processing when action has been started under any regulatory provision which authorizes a characterization of service of under other than honorable conditions.

b. If the case comes within the limitations above, the commander exercising general court-martial jurisdiction over the soldier may abate the administrative separation. This authority may not be delegated. A copy of the decision, signed by the general court-martial convening authority (GCMCA), must be forwarded with the disability case file to the PEB. A case file may be referred in this way if the GCMCA finds the following:

(1) The disability is the cause, or a substantial contributing cause, of the misconduct that might result in a discharge under other than honorable conditions.

(2) Other circumstances warrant disability processing instead of alternate administrative separation.

c. A soldier being considered for separation because of unsatisfactory performance (AR 635–200, chap 13), must be referred for disability processing upon approved recommendation of a MEBD (AR 635–200, para 1–35*a*).

4–4. Commissioned or warrant officers who may be separated under other than honorable conditions

a. A commissioned or warrant officer will not be referred for disability processing instead of elimination action (administrative separation) that could result in separation under other than honorable conditions. Officers in this category who are believed to be unfit because of physical disability will be processed simultaneously for administrative separation and physical disability evaluation.

b. Commanders exercising general court-martial authority will ensure that the foregoing actions processed together are properly identified and cross-referenced. The administrative separation will be forwarded to the Commander, PERSCOM, ATTN: TAPC–OPP–M, Alexandria, VA 22332–0418.

c. The Commander, PERSCOM, will refer the entire file, including both courses of action, to the Office of the Secretary of the Army, ATTN: SAMR–

RB, Washington DC 20310–3073 for necessary review. The SA will decide the proper disposition of the case.

4–5. Soldiers absent without leave (AWOL)

A soldier may not be processed through the Army Physical Disability Evaluation System unless he or she is under military control. The soldier must be available to be notified of the findings of the PEB and to indicate concurrence or nonconcurrence with the PEB findings and recommendations. If AWOL, the soldier's case file may not be sent to a PEB. If determined AWOL after the soldier's case file has been referred, the PEB must be promptly notified in order to suspend processing. If the soldier returns within 10 days, the PEB must be notified so that processing may resume. Any substantial change in the soldier's condition during a period of AWOL must be recorded by an addendum to the original MEBD or by a new MEBD and furnished to the PEB.

Section II
Initiation of Medical Evaluation

4–6. Referral by HQDA

The Commander, PERSCOM, upon recommendation of TSG, may refer a soldier to the responsible MTF for medical evaluation when a question arises as to the soldier's ability to perform the duties of his or her office, grade, rank, or rating because of physical disability.

4–7. Referral by commanders of MTFs

Commanders of MTFs who are treating soldiers in an assigned, attached, or outpatient status may initiate action to evaluate the soldier's physical ability to perform the duties of his or her office, grade, rank, or rating.

4–8. Referral by commanders

When a commander believes that a soldier of his or her command is unable to perform the duties of his or her office, grade, rank, or rating because of physical disability, the commander will refer the soldier to the responsible MTF for evaluation. The request for evaluation will be in writing and will state the commander's reasons for believing that the soldier is unable to perform his or her duties. DD Form 689 (Individual Sick Slip) may be used for such referral (AR 600–6). Commanders of Reserve units not on active duty will be guided by AR 40–501 and chapter 8 of this regulation.

Section III
Medical Processing Related to Disability Evaluation

4–9. Medical examination

The MTF commander having primary medical care responsibility will conduct an examination of a soldier referred for evaluation. The commander will advise the soldier's commanding officer of the results of the evaluation and the proposed disposition. If it appears the soldier is not medically qualified to perform duty, the MTF commander will refer the soldier to a MEBD.

4–10. The MEBD

MEBD's are convened to document a soldier's medical status and duty limitations insofar as duty is affected by the soldier's status. A decision is made as to the soldier's medical qualification for retention based on the criteria in AR 40–501, chapter 3. If the MEBD determines the soldier does not meet retention standards, the board will recommend referral of the

soldier to a PEB. For MEBD's rules for documentation, recommendations, and disposition of the evaluated soldier, see AR 40–3, chapters 7 and 8.

4–11. Narrative summary (NARSUM)

The NARSUM to the MEBD is the heart of the disability evaluation system.Incomplete, inaccurate, misleading, or delayed NARSUMs may result in injustice to the soldier or to the Army.

a. Physicians who prepare cases for the MEBD and PEB should use the VA Physician's Guide for Disability Evaluation Examinations (published by the VA)to describe physical defects. This helps to ensure consistency in reporting similar conditions and assists the boards of the disability system in their review and evaluation process. (See AR 40–3, chapter 8.)

b. In describing a soldier's conditions, a medical diagnosis alone is not sufficient to establish that the individual is unfit for further military service. The history of the soldier's illness, objective findings on examination, results of X-ray and laboratory tests, reports of consultations, response to therapy, and subjective conclusions with rationale must be addressed.

c. A correlation must be established between the soldier's medical defects and physical capabilities. (This is important when a chronic condition is the basis for referral to a PEB and no change in severity of the condition has occurred or when referral of the case to a PEB appears controversial.)

d. The date of onset of a medical impairment may be questionable because of relatively short military service and the nature of the impairment, for example,

a mental disease. If so, the NARSUM should address the results of inquiry into the pre-service background (family, relatives, medical, and community) of the soldier in sufficient detail to overcome substantive question concerning the date of onset.

e. When a soldier is diagnosed with a mental disorder, the NAR-SUM must include a statement indicating whether the soldier is mentally competent for pay purposes and capable of understanding the nature of, and cooperating in, PEB proceedings.

f. NARSUMs will not reflect a conclusion of unfitness. Therefore, diagnoses must not be qualified by such terms as "unfitting", "disqualifying", "ratable", "not ratable".

g. When disclosure of medical information would adversely affect the soldier's physical or mental health, the NARSUM should include a statement to that fact.

h. The NARSUM should include the date of the physical examination conducted for purposes of physical disability evaluation.

i. MEBD proceedings from other than Army MTF's must be forwarded through the designated Army facility (AR 40–3, chap 7).

4–12. Counseling soldiers who have been evaluated by a MEBD

a. The PEBLO will advise the soldier of the results of the MEBD. The soldier will be given the opportunity to read and sign the MEBD proceedings. If the soldier does not agree with any item in the medical board report or NARSUM, he or she will be advised of appeal procedures.

b. The decisions below are exclusively within the province of adjudicative bodies. Neither the PEBLO nor the attending medical personnel will tell the soldier that—

(1) The soldier is medically or physically unfit for further military service.

(2) The soldier will be discharged or retired from the Army because of physical disability.

(3) A given percentage rating appears proper.

(4) A LD decision is final (unless final approval has been obtained according to AR 600–8–1).

4–13. Referral to a PEB

a. The MEBD will recommend referral to a PEB those soldiers who do not meet medical retention standards. Those who apply for COAD under the provisions of chapter 6 will be included. Do not refer soldiers to a PEB who request discharge under the provisions of chapter 5. A soldier being processed for nondisability separation will not be referred to a PEB unless the soldier has medical impairments that raise substantial doubt as to his or her ability to continue to perform the duties of his or her office, grade, rank, or rating.Soldiers previously found unfit and retained in limited assignment duty status under chapter 6, or a previous authority, will be referred to a PEB.

b. A soldier may provide additional information to the MTF commander to forward to the PEB. The information may be from the unit commander, supervisor, or other persons who have knowledge regarding the effect the condition has on the soldier's ability to perform the duties of the office, grade, rank, or rating.

c. Personnel processing actions for soldiers referred to a PEB will be according to appendix E.

4–14. Psychiatric and spinal cord injury patients requiring continuing hospitalization

a. AR 40–3 provides for transfer of psychiatric and spinal cord injury patients to a VA medical facility.

(1) Psychiatric patients requiring continuing hospitalization may be transferred after completion of MEBD action. To ensure timely processing, the MEBD proceedings must be referred to the PEB immediately after transfer of the patient.

(2) Spinal cord injury patients requiring continuing hospitalization will be expeditiously transferred to the VA Spinal Cord Injury Center, regardless of whether the MEBD is completed. The MTF that has responsibility for patients in the particular VA Spinal Cord Injury Center will coordinate the completion and processing of the MEBD.

b. The PEBLO of the MTF that has responsibility for the completion of the MEBD will provide disability counseling to the soldier or the soldier's next-of-kin when the soldier is mentally incompetent. The PEBLO will also notify the Installation Retirement Services Officer of the soldier's transfer to the VA hospital; and in cases of mental incompetence, provide the RSO the name and address of the next of kin in order to coordinate counseling on SBP as required under section 1455, title 10, United States Code (10 USC 1455).

4–15. Action following approval of MEBD report

The MTF commander will notify the unit commander of the planned referral of a soldier to a PEB and

obtain from the commander the written statement described in paragraph e below. If further action is not barred, the original and two copies of the MEBD proceedings and allied documents described below, as applicable, will be forwarded to the PEB.

a. DA Form 5889–R (PEB Referral Transmittal Document). This document serves as the forwarding memorandum. It identifies the documents forwarded and provides unit and home addresses and telephone numbers for the PEB to contact the soldier as required. DA Form 5889–R will be locally reproduced on 8½ by 11 inch paper. A copy of the form for reproduction purposes is located at the back of this regulation.

b. Documents submitted by soldier to accompany MEBD as evidence of physical ability to adequately perform military duties (letters, efficiency reports, or personal statements).

c. DA Form 3947 (Medical Evaluation Board Proceedings) with SF 502(Medical Record—Narrative Summary Clinical Survey) as enclosure 1 and DA Form 3349 (Physical Profile) as enclosure 2.

d. In cases where the soldier has been determined mentally incompetent, a statement confirming the name, address, telephone number, and relationship of individual authorized to act in behalf of the soldier; whether this person is available for counseling following PEB action; and whether the person has been advised of the referral to a PEB. If the next-of-kin is not known or cannot be located and no court-appointed guardian exists, include a summary of the attempts to identify or locate the next-of-kin. To establish the individual having authority to act for an incompetent soldier, in the absence of a valid and

pertinent power of attorney or a court order authorizing an individual to act for an incompetent soldier, follow the guidelines below. The person authorized to act is the person highest in the line of authority listed below.

(1) Spouse, even if a minor.

(2) Adult sons or daughters in order of seniority. An individual is an adult upon reaching the age of majority under the state law of the individual's legal residence.

(3) Parent in order of seniority, unless legal custody was granted to another person by reason of court decree or statutory provision. The person to whom custody was granted remains as next of kin although the individual has reached the age of majority.

(4) Blood or adoptive relative who was granted legal custody of the person by reason of a court decree or statutory provision. The person to whom custody has been granted remains the nearest next of kin although the individual has reached age of majority.

(5) Adult brother and sisters in order of seniority.

(6) Grandparents in order of seniority.

(7) Other relatives in order of relationship to the individual and according to the laws of the soldier's domicile. A soldier's domicile is the soldier's legal residence. It is not necessarily where the soldier is actually living, the soldier's home of record, or where the soldier is stationed.

(8) Persons who stand in place of a parent. Seniority in age will control when the persons are of equal relationship.

e. Statement from soldier's commander confirming whether any adverse personnel action is being considered against the soldier and describing the soldier's current duty performance. The description of duty performance should address the following:

(1) The soldier's most recent performance of duty.

(2) Any special limitation of duty due to the soldier's physical condition.

(3) The soldier's ability to adequately perform the duties normally expected of an individual of the soldier's office, grade, rank, or rating.

(4) The soldier's current duty assignment, anticipated future assignments, branch, age, and career specialities.

f. A copy of the document reflecting the approved LD decision (AR 600–8–1) if the disability is the result of injury; the result of disease secondary to injury or due to misconduct; or the result of disease when the case is that of a soldier performing duty for 30 days or less. Provide either a DD Form 261, DA Form 2173, or similar LD reports from the Navy or Air Force.If the documents are not available, the MTF commander will send a request for LD decision, well in advance of a preparation of the MEBD report, to the soldier's unit of assignment at the time of injury or disease. Include a copy of the request in the case file sent to the PEB and send a copy to PERSCOM(TAPC–PED–S). The request will provide the following information:

(1) Name, grade, and SSN.

(2) Date and place of injury.

(3) Short summary of circumstances of injury, including the identity of MTF where the soldier was treated.

(4) Unit of assignment when the soldier was injured. (5) Statement that the LD determination is required for disability processing.

g. Orders or training schedule under which the soldier was performing active duty, active duty for training, or inactive duty training when the soldier is subject to disability processing under chapter 8. If the soldier is retained for medical care beyond termination date of active duty for training, include a copy of the affidavit required by AR 135–381. If referral to a PEB occurs during rehospitalization for treatment of residuals of an injury, provide a copy of the authorization for rehospitalization required by AR 40–3, para 4–2d(2).

h. Copy of memorandum approving COAD when case is that of a soldier previously continued on duty under the COAD program. If available, include a copy of the DA Form 199 related to the previous COAD action.

i. Soldier's request for COAD under chapter 6 of this regulation.

j. Statement of COAD counseling when soldier has 18 but less than 20 years of service and declines to request COAD. (para 6–5).

k. Copy of decision by the GCMCA to waive administrative separation under AR 635–200, chapter 14 for referral of soldier to a PEB. Requirement applies even if a general discharge is directed under AR 635–200, chapter 14.Requirement is not applicable to soldiers pending separation under AR 635–200, chapter 13.

l. Statement from the custodian of the soldier's personnel records confirming whether one of the

circumstances below is applicable at the time the soldier is referred to a PEB.

(1) Voluntary or mandatory retirement processing.

(2) Expiration of term of service without reenlistment.

(3) Expiration of term of service with bar to reenlistment.

(4) Involuntary release from active duty due to DA board action.

(5) Qualitative management denial for reenlistment.

(6) Adverse personnel action.

m. Document authorizing soldier's retention beyond scheduled separation or retirement date. (See AR 635–100, AR 635–120, or AR 635–200.)

n. If available, DA Form 2 (Personnel Qualification Record—Part I) and DA Form 2–1 (Personnel Qualification Record—Part 2). If the documents are not available, use alternative sources to obtain the required personnel data if the information is reliable. Examples include requesting the Military Personnel Office (MILPO) to extract a DA Form 2A (Personnel Qualification Record, Parts I and II) from SIDPERS and asking the soldier to furnish the information directly. The use of alternative sources does not relieve the PEBLO of the requirement to initially request a copy of the DA Form 2 and DA Form 2–1.

o. If available, a statement explaining the reason for reduction to the lower grade when the soldier is serving in a grade below the highest grade held. When the information is available, include a statement explaining the circumstance precluding

advancement to private or private first class under the provisions of AR 600–200 (NGR 600–200 or AR 140–158 for soldiers in the Reserve Components) if—

(1) The current grade is private (pay grade E–1), and the soldier has completed more than 6 month's service.

(2) The current grade is private (pay grade E–2), and the soldier has completed more than 12 months service.

p. Copy of request for VA hospital bed designation, if applicable.

q. Copy of orders moving patient to a VA hospital for continued hospitalization, if applicable.

r. Copy of letter(s) to proper state authorities, as applicable.

s. Copy of the request for Statement of Service when soldier is a member of the Reserve Components (fig 4–1).

t. Copy of latest DA Form 3686–1 (Army Leave and Earnings Statement).

4–16. Rehospitalization of disabled soldier

A soldier who is rehospitalized while undergoing disability evaluation or awaiting final disposition must be evaluated to decide if his or her condition may change the findings or recommendations of the PEB. If the soldier's condition may change the findings and recommendations, the MTF commander will notify the PEB president. Further adjudicative and review action may be suspended pending resolution. When the soldier has received optimum hospital improvement for disposition purposes, the hospital commander will prepare an addendum to the original medical board.

The addendum will be forwarded to the PEB with any other pertinent records unless some other disposition is indicated. The PEB must be notified if other disposition terminates disability processing.

Section IV
Physical Disability Evaluation

4–17. PEBs

a. Purpose. PEBs are established to evaluate all cases of physical disability equitably for the soldier and the Army. The PEB is not a statutory board. Its findings and recommendations may be revised. It is a fact-finding board for the following:

(1) Investigating the nature, cause, degree of severity, and probable permanency of the disability of soldiers whose cases are referred to the board.

(2) Evaluating the physical condition of the soldier against the physical requirements of the soldier's particular office, grade, rank, or rating.

(3) Providing a full and fair hearing for the soldier as required by section 1214, title 10 United States Code (10 USC 1214).

(4) Making findings and recommendations required by law to establish the eligibility of a soldier to be separated or retired be-cause of physical disability (10 USC 61).

b. Composition. PEBs will consist of at least three members(president, personnel management officer, and a medical member). PEB members will be experienced officers who are thoroughly familiar with board procedures. The CG, USAPDA will appoint PEB members from assigned personnel for full-time duty. Part-time members may be appointed by the CG, USAPDA with the consent of the commander

having jurisdiction over the individual to be appointed-.Part-time members supplement or temporarily replace full-time members, as needed, for the prompt processing of disability cases. The president and personnel management officer will be field grade officers (other than Medical Corps) on active duty in the U.S. Army (other than active duty for training).The medical member will be either an officer of the U.S. Army Medical Corps or a Department of the Army civilian (DAC) physician with previous U.S. Army Medical Corps experience. The medical member must not have served in any capacity with the MEBD that referred the soldier to the PEB. If possible, the voting members should be senior to the person being evaluated. To ensure fair and independent decision making, the PEB president will not rate the other members of the board for purposes of evaluating job proficiency.

c. President of PEB. The appointing authority will name a senior commissioned officer as president of each PEB. The senior nonmedical member will act as president when the president is absent. The president has full responsibility for the board. He will ensure that law, regulations, and DA adjudicative principles are followed.

d. Reserve Component member. When a soldier of the Reserve Components (RC) is being evaluated, one of the PEB members must be a Reserve officer who is otherwise qualified for duty as a member of the PEB.

e. Disqualification. PEB voting members must disqualify themselves if they have had a personal or professional relationship with the soldier being evaluated.

f. Disability evaluation of PEB members. When members of the PEB are referred into the physical disability system, they will be evaluated by other than the PEB to which assigned. After PEB evaluation such cases will be forwarded to USAPDA for review.

g. Female or minority representation.

(1) When requested, the PEB will substitute a female or minority soldier of the same minority group for one of the regular members of the board, if the requested representation is reasonably available. Request for female or minority representation should be made in writing at the time of request for a formal hearing. The substitute must meet the qualifications for regular voting members. The PEB president will determine if the requested representation is reasonably available. The proceedings will include a statement of the request and whether the representation was or was not provided, that is, "Minority (or female) representation was requested and provided" or "Minority representation (or female) was requested and not reasonably available and, therefore, was not provided."

(2) When an enlisted soldier is being evaluated, the PEB will upon written request of the soldier, include enlisted representation if reasonably available. Request for enlisted representation should be in writing at the time of request for a formal hearing. The enlisted representation must be in the ranks of sergeants first class to sergeants major and senior to the soldier being evaluated. The PEB president will determine if enlisted representation is reasonably available. The proceedings will include a statement of the request and whether the representation was or was not provided as described in paragraphg(1)

above. When enlisted representation is provided, the PEB will increase to five members, all of whom will have a vote. The fifth member may be enlisted or officer.

h. Counsel. An Army attorney will be appointed as counsel to represent soldiers at formal PEB hearings. The attorney will not be a voting member of the PEB or an advisor to the PEB, but will represent the soldier as required when the soldier requests a formal hearing. The attorney will counsel the soldier until formal disability proceedings are completed. The appointed counsel may also advise PEBLOs of MTFs that refer cases to the PEB.

i. Recorder. The appointing authority will assign a permanent recorder for the PEB. The recorder will be a commissioned officer, warrant officer, or civilian employee of equivalent grade of any branch or career field except those listed below.

(1) Medical Corps.

(2) Dental Corps.

(3) Army Nurse Corps.

(4) Army Medical Specialist Corps.

(5) The Judge Advocate General's Corps.

j. Reporter. The appointing authority will assign permanent qualified reporters to the PEB.

k. Support. A PEB is a tenant of the installation where located. The CG, USAPDA enters into agreements providing for administrative and logistical support with installation and MTF commanders.

4–18. Initial processing

a. Upon receipt of a case by the PEB, the case file will be reviewed to ensure it is complete. If documents are missing, action will be taken to complete

the file. When the case file is complete, it may be referred to the board for evaluation.

b. The PEB may return a case to the MTF commander for additional information. However, efforts should be made to resolve all issues without returning the case. When circumstances permit resolution of the problem by discussion, a memorandum of the discussion must be included in the case file as an exhibit. When return of the case to the MTF is necessary, the reason for its return will be clearly stated in the letter of transmittal. Examples of reasons for which a case may be returned are as follows:

(1) Further physical examination, clarification, or preparation of additional records is required.

(2) Additional description and information by the medical board of the soldier's defects and their effect on the soldier's functional ability to perform duty are necessary for proper PEB evaluation of the case.

(3) Further observation, evaluation, and reconsideration by a medical board is required.

(4) Additional information from the command concerning the soldier's ability to perform the duties of his or her office, grade, rank, or rating must be provided for proper PEB evaluation of the case.

(5) The soldier has been AWOL for 10 days or more.

4–19. PEB decisions—common criteria

a.. Determinations. The voting members of a PEB make findings and recommendations in each case on the basis of the instructions set forth in paragraphs b thru q below. The board decides all questions by majority vote. All findings must be based on a

preponderance of the evidence. Recommendations must be supported by the findings. In summary, the board determines the following:

(1) Whether the soldier is physically fit or unfit to perform the duties of the soldier's office, grade, rank, or rating.

(2) Whether the disability is of a permanent nature.

(3) Whether the disability meets the criteria established by law for compensation. This determination considers the following questions:

(a) Was the disability incurred or aggravated while the soldier was entitled to basic pay (when the soldier is on active duty for more than 30 days)?

(b) Was the disability the result of misconduct or willful neglect or incurred during a period of unauthorized absence?

(c) Was the disability incurred in LD during a time of war or national emergency or incurred in LD after 14 September 1978?

(d) In the case of a soldier ordered to active duty for 30 days or less or ordered to duty under section 270(b), title 10, United States Code (10 USC 270(b)), was the disability the proximate result of performing active duty or inactive duty training? If the disability results from a disease, was it incurred prior to or after 15 November 1986 (chap 8).

(3) Whether the disability meets the criteria for exemption of disability retired or severance pay from gross federal income.

(4) Whether the disability meets the criteria for Civil Service preference eligible status and exemption from the Dual Compensation Act.

b. Limitations of PEB approval authority. The PEB may approve for the SA all but the following cases:

(1) General and medical corps officers found unfit.

(2) Informal proceedings when the soldier non-concurs, waives a formal hearing, and submits within the required time frame a statement explaining his or her reasons for disagreement. The PEB will forward the proceedings to USAPDA for review when its consideration of the rebuttal does not result in a change of the PEB findings and recommendations.

(3) Formal proceedings when the soldier non-concurs with any finding or recommendation, submits within the required time frame a statement explaining his reasons for disagreement, and the PEB does not modify its decision as requested by the soldier.

(4) All cases in which a minority report is submitted.

(5) Cases of members assigned to a PEB.

(6) Any case previously forwarded to USAPDA for review and approval, which was returned to the PEB for reconsideration or rehearing.

c. *Additional documents.* Any member of the PEB, the soldier, or counsel acting in the soldier's behalf may request additional documents. The PEB president will determine if the requested information is required for proper adjudication of the case. If it is determined that the additional information is

required, the PEB president will suspend consideration of the case until an effort has been made to obtain the requested information. If requested documents cannot be obtained, a memorandum for record will be included in the case file reflecting all efforts made to obtain the information. The case will then be adjudicated on the basis of the available evidence.

d. Decision on fitness.

(1) The first and most important determination made by the PEB is whether the soldier is physically fit or unfit to perform the duties of the soldier's office, grade, rank, or rating. All other actions are directly or indirectly tied to this one finding.

(2) The determination of physical fitness will be made by relating the nature and degree of physical disability of the soldier to the requirements and duties that the soldier may reasonably be expected to perform in his or her primary MOS.

(3) Changes in medications or other therapy for chronic conditions do not alone establish deterioration of a chronic condition. Unless recent, significant deterioration has occurred or unexpected adverse results are evident from the new treatment, such changes are not a basis for finding a soldier unfit.

e. Conditions which existed prior to entry in service.

(1) Unchanged physical defects. A soldier will not be found unfit because of physical defects that—

(a) Were known to exist at the time of acceptance for military service,

(b) Have remained essentially unchanged since acceptance,

(c) Have not interfered with performance of effective military service.

(2) *Application of accepted medical principles.* After a soldier is accepted for active duty, discovery of an impairment causing physical disability is not conclusive evidence that the condition was incurred after acceptance. Consideration must also be given to accepted medical principles in deciding whether a medical impairment was the result of, or aggravated by, military service while the soldier was entitled to basic pay; or in the case of a Reservist on active duty for 30 days or less, whether the disability was the proximate result of performing active duty or inactive duty training. Accepted medical principles may not be excluded in making these decisions even when there is no other evidence indicating the impairment was present before the soldier's entry on active duty. The soldier's length of service must be considered when determining service aggravation. When a decision or recommendation of a PEB is based primarily on accepted medical principles, the principle must be cited as part of the rationale.

(3) *Service aggravation.*

(a) The PEB may decide that a soldier's physical defect existed prior to service, or inactive duty for training, or resulted from a nonservice connected condition (not in LD). If so, the board must further consider whether military service aggravated the unfitting defect.

(b) If the soldier's military service makes the condition worse or hastens the natural progression of the condition beyond the normal or anticipated rate had he or she not been exposed to such service, a finding of aggravation must be considered. AR

600–8–1, chapter 41, contains guidance on service aggravation. When the PEB decides that a condition has been aggravated by service, the PEB will consider the degree of disability that is in excess of the degree existing at the time of entrance into service. (app B).

(4) *Conditions not aggravated by service.* Soldiers who are unfit by reason of physical disability neither incurred nor aggravated during any period of service while entitled to basic pay, or as the proximate result of performing active duty or inactive duty training, but which effects duty performance, will be separated for physical disability without entitlement to benefits.

(a) Enlisted soldiers who are eligible for discharge under chapter 5, may be processed under the provisions of that chapter upon their application.

(b) Soldiers who meet the criteria and apply for COAD as set forth in chapter 6 will be processed under the provisions of that chapter.

(c) RC soldiers may request transfer to the Retired Reserve if eligible.

f. Entitlements to benefits. The following rules apply when deciding whether a soldier is entitled to Army disability retired or severance pay.

(1) Sections 1201 through 1203, title 10, United States Code (10 USC 1201 thru 1203) establish the criteria for compensation for soldiers of the Regular Army or soldiers of the RC ordered to active duty for more than 30 days(other than for training under 10 USC 270(b)). These criteria include the following:

(a) Disability was incurred while the soldier was entitled to basic pay.

(b) The disability is not the result of the soldier's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and either the soldier has at least eight years of active federal service for retirement; the disability is the proximate result of performing active duty; the disability was incurred in the line of duty in time of war or national emergency; or the disability was incurred in line of duty after September 14, 1978.

(2) Sections 1204 through 1206, title 10, United States Code (10 USC 1204 thru 1206) establish the criteria for entitlements for soldiers of the RC ordered to active duty for 30 days or less or under 10 USC 270(b) (chap 8).

(3) Decision of the Comptroller General of the United States, B–205953, dated 18 June 1982, has ruled that a member in excess leave status is not entitled to basic pay and, therefore, is not entitled to any disability benefits under the provisions of 10 USC 61.

(4) When a finding of unfitness depends on the combined effect of two or more disabilities, each disability must meet the above eligibility requirements to qualify the soldier for disability retirement or severance pay.If one of the combined disabilities that, in combination, renders the soldier unfit does not meet the requirements for entitlement to benefits, the soldier is not eligible for disability benefits from the Army. For example, a soldier may be found unfit because of a disability determined to be EPTS. That soldier may also have a disability that alone is not unfitting but when considered with the EPTS disability would be unfitting. Such a soldier may not be found unfit because of the first disability (EPTS) and

thereafter rated for the second disability (which is only unfitting in combination with the first disability).

(5) If the soldier is entitled to disability benefits, the PEB decides the rating for each compensable disability from the VASRD, as modified by appendix B.

(6) When a soldier is eligible for disability benefits, any other disability is compensable if—

(a) The criteria in (1) and (2) above are met.

(b) The disability, in itself, is unfitting or contributes to the unfitting condition.

g. Application of LD policy.

(1) Normally PEBs accept the validity of informal and formal LD investigations and reports. However, the PEB may question the validity of a favorable LD determination. If so, the PEB will conditionally adjudicate the case as if a favorable line of duty decision is correct. Unless the case is subject to review by USAPDA, the PEB will forward the case to PERSCOM (TAPC–PED–S), requesting a review of the LD determination. The following comment will be made in the remarks section of the DA Form 199. "This PEB questions the validity of the line of duty decision rendered in your case. Your case has been processed assuming the decision is valid. Should an unfavorable line of duty determination result, you will not be eligible for entitlement to benefits under the Army disability system." The soldier will be informed of the conditional processing and advised that final disposition by HQDA will be held in abeyance until the LD decision is resolved.

(2) It is not intended that PEBs act as hearing authorities for soldiers' appeal of LD determinations.

AR 600–8–1 sets out LD appeal procedures. However, if during a formal hearing, the soldier or his or her counsel presents evidence of error in the LD finding, the PEB shall consider such evidence. If the PEB believes the evidence warrants reconsideration of the LD finding, a referral of the case to PERSCOM (TAPC–PED–S) for review of the LD determination by TAG is authorized. When forwarding a case for such review, the PEB will explain in the forwarding memorandum its rationale for determining that the new evidence raises a question as to the correctness of the LD determination. The soldier and his or her counsel will be advised of the referral and that the case has been conditionally adjudicated as if a favorable LD decision has been made. If the PEB determines that the evidence does not provide reason to question the LD determination, the PEB will inform the soldier and the counsel of this fact and that the case was adjudicated based upon the approved LD determination.

(3) The deputy commander, PEB president, or alternate PEB president have the authority to make a finding of "in line of duty—not due to own misconduct" in the following categories below when an LD determination has not been made at the time a case is referred to a PEB. This authority may only be used when the PEB is convinced no further investigation is required and the weight of the evidence in the case indicates that the injury was not due to misconduct or willful negligence, was not incurred during a period of unauthorized absence, and that the use of alcohol or drugs was not involved.

(a) Training accidents to include maneuvers and physical training.

(b) Unit organized sports and recreational activities.

(c) Individual jogging and sports activities.

(d) Household accidents.

(e) Slip-and-fall injuries.

(f) Injuries incurred in Vietnam, Cambodia, and in other geographical areas where U.S. Army soldiers are not longer present.

(4) If the case is lacking an LD determination and it does not fall into one of the above categories, the PEB will conditionally adjudicate the case as if a favorable decision has been made. The applicable advisory statement described in para 4–19l(2) will be included on the Form 199. The soldier will be informed of the conditional processing and advised that final disposition by HQDA will be held in abeyance until the LD decision is resolved.

h. Deciding permanency of disability.

(1) Based on accepted medical principles, a disability is "permanent", and a soldier who is otherwise qualified will be permanently retired, if—

(a) The defect has become stable so that, with reasonable expectation, the compensable percentage rating will remain unchanged during the following 5-year period.

(b) The compensable percentage rating is 80 percent or more and the disability will probably not improve so as to be ratable at less than 80 percent during the following 5 years.

(2) A soldier is placed on the TDRL if fully qualified for permanent retirement except that the disability "may be permanent." The soldier may not

be placed on the TDRL for any other reason. Based on accepted medical principles, a disability will be considered as "may be permanent" if it has not stabilized, and one of the following occurs:

(a) The soldier may recover so as to be fit for duty.

(b) The defect is expected to change in severity within the next 5 years so as to change the compensable percentage rating.

i. Percent of disability. After establishing the fact that a soldier is unfit because of physical disability, and that the soldier is entitled to benefits, the PEB must decide the percentage rating for each unfitting compensable disability. Percentage ratings reflect the severity of the soldier's medical condition at time of rating. The VASRD, as modified by appendix B of this regulation, is used in deriving percentage ratings. The first 31 paragraphs of the VASRD, which provide general policies, do not apply and have been replaced by section I and II of appendix B of this regulation. PEBLOs, raters, and reviewers must be familiar with the VASRD, including introductory paragraphs to sections and italicized footnotes. Appendix B sets forth Army policies (including modifications) on use of the VASRD when rules or ratings provided by the VA schedule are improper for Army use or do not provide a rating basis.

j. Armed conflict—instrumentality of war. Certain advantages accrue to soldiers who are retired for physical disability and later return to work for the Federal Government when it is determined that the disability for which retired was incurred under specific circumstances. These advantages concern preference eligible status within the Civil Service

system (section 3501, title 5, United States Code (USC 3501)) and exemption of retired veterans to the provisions of the Dual Compensation Act (section 5532, title 5, United States Code (5 USC 5532)). As part of its findings, the PEB will make an entry in block 10A of DA Form 199 to reflect its determination as to whether the disability was incurred within the specified parameters discussed below.

(1) The disability resulted from injury or disease received in LD as a direct result of armed conflict and which itself renders the soldier unfit. A disability may be considered a direct result of armed conflict if—

(a) The disability was incurred while the soldier was engaged in armed conflict, or in an operation or incident involving armed conflict or the likelihood of armed conflict; while the soldier was interned as a prisoner of war or detained against his will in the custody of a hostile or belligerent force; or while the soldier was escaping or attempting to escape from such prisoner of war or detained status.

(b) A direct causal relationship exists between the armed conflict or the incident or operation, and the disability.

(2) The disability is unfitting, was caused by an instrumentality of war, and was incurred in LD during a period of war as defined by law. The periods of war as defined in 38 USC 101 and 301 are shown below: (The statute does not include the action in Grenada).

(a) World War II. The period beginning 7 December 1941 and ending 31 December 1946 and any period of continuous service performed after 31

December 1946 and before 26 July 1947 if such period began before 1 January 1947.

(b) Korea. The period beginning 27 June 1950 and ending 31 January 1955.

(c) Vietnam. The period beginning 5 August 1964 and ending 7 May 1975. (The "Dominican Intervention" occurred during this period.)

k. *Disability compensation excluded from gross income.*

(1) *The Tax Reform Act of 1976 (TRA 76).* Prior to the enactment of TRA 76 (section 104, title 26, United States Code (26 USC 104)), military disability retired pay or disability severance pay was excluded from gross income for Federal tax purposes. (Disability retired pay is that portion of retired pay based on a person's disability percentage rating. Disability severance pay is a lump sum payment based on years of service.) With the passage of TRA 76, one of two conditions listed below must be satisfied for military disability retired or severance pay to be exempt from Federal taxation.

(a) On 24 September 1975, the individual was a member (including RC membership) of the armed forces of any country, the National Oceanic and Atmospheric Administration (NOAA and formerly the Coast and Geodetic Survey), the U.S. Public Health Service (USPHS), or was under binding written agreement to become such a member. (Soldiers retired or separated by reason of disability on or before the cited date are not affected by TRA 76.)

(b) The disability pay is awarded by reason of a combat-related injury. Within the meaning of 26 USC 104, combat-related injuries cover those disabilities

attributable to the special dangers associated with armed conflict or the preparation or training for armed conflict.

1. A soldier may be performing extrahazardous service even if not directly engaged in combat. Extrahazardous service includes but is not limited to the following activities: Aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty.

2. Conditions simulating war include, but are not limited to, the following activities: performance of tactical exercises such as the squad or platoon in the assault; airborne operations; leadership reaction courses; grenade and live fire weapons practice; bayonet training; hand-to-hand combat training; repelling; and negotiation of combat confidence and obstacle courses.

3. Unlike the provisions for exemption from the Dual Compensation Act(5 USC 5532) and the provisions for Civil Service retention preference (5 USC 3501), the injury resulting from an instrumentality of war need not have occurred during a period of war as defined by law.

(2) *Entries on DA Form 199.* The entries made on DA Form 199, blocks 10B and 10C, concern disability compensation excludable from gross income.

(a) If the PEB can establish the fact (from available records) that the soldier was or was not a member or obligated to become a member of one of the designated organizations on 24 September 1975, the board will make the proper entry in block 10B. If such a decision cannot be made, the PEB will enter a statement after the last entry in block 8 to reflect that fact and leave block 10B blank.

(b) In block 10C, the board will record its determination of whether the injury was combat-related as defined by 26 USC 104.

(3) *VA compensation.* VA compensation is exempt from income tax. An individual may waive disability retired pay to receive VA compensation, or receive a combination of the two, or receive military retired pay and exclude from his or her gross income an amount equal to the VA entitlement. The Army does not make the determination as to the probable VA disability compensation. The individual must apply to the VA and receive a disability rating.

l. Recording of rationale and advisory statements.

(1) *Rationale.* The PEB will include the rationale for the findings and recommendations on the DA Form 199 along with a statement of the reasons for finding a soldier fit or unfit, and if unfit, the basis for the rating. The rationale will support specifically, the finding that the soldier was, or was not, capable of performing the duties of his or her office, grade, rank or rating. A significant variance may occur between the disability described in block 8 of DA Form 199 and diagnoses or degree of impairment reflected in the MEBD proceedings. If so, explain the variance completely in block 16.

(2) *Advisory statements.* The DA Form 199 will inform the soldier of legal or administrative requirements that impact on the soldier's disability benefits in the situations described below.

(a) When the recommendation of the PEB is placement or retention on the TDRL: "Failure to report for a scheduled periodic examination or to inform PERSCOM of a change in address will result in the suspension of retired pay. Address changes

must be reported to: Commander, PERSCOM, ATTN: TAPC–PDB, 2461 Eisenhower Avenue, Alexandria, VA 22331–0477."

(b) When a case has been adjudicated pending completion of a LD: "Your case has been conditionally adjudicated pending the receipt of a favorable LD determination. Should an unfavorable LD determination result, you will not be eligible for benefits under the Army disability system."

(c) When a soldier has a rating of less than 30 percent and has at least 20 qualifying years for retirement for non-regular service: "You have the option of accepting discharge with disability severance pay and forfeiting retirement for non-regular service; or you may request transfer to the Retired Reserve and receive retired pay at age 60. According to sections 1209 and 1213, title 10 United States Codes (10 USC 1209 and 1213), you will forfeit all rights to retired pay if you accept severance pay instead of transfer to the Retired Reserve."

m. Minority reports. If a voting member of the PEB disagrees with the findings and recommendation of the other members, that member may prepare a minority report explaining wherein and why he or she differs with the other members. The minority report will be included in the record of the proceedings and referenced in the remarks section of DA Form 199. A copy will be provided to the soldier and his or her counsel.

n. Continuances. A PEB may continue a hearing upon its own motion, at the request of the recorder, or at the request of the soldier or the soldier's counsel, if the board determines a continuance is needed for a full and fair hearing. Examples of proper

reasons for continuance are the need for further medical evaluation and the need to obtain additional records, reports, or statements as evidenced in the case. When a continuance is granted, only one DA Form 199 will be used. Data such as the date, fact, and time of recess and reconvening, and changes in membership will be recorded. If a change of membership is involved, the record will show the reason for the change and that the new member became familiar with the case before proceeding with the hearing.

o. Recording, assembly, and transmittal of reports of proceedings.

(1) The findings and recommendations of the PEB are recorded on DA Form 199. This form is distributed on a limited issue basis from the US Army Publications Distribution Center to the PEB's. Instructions for completion of the form are at appendix D. The recorder will initial erasures and corrections involving any substantive matters in the proceedings.

(2) Records of PEB proceedings will be assembled as indicated in table 4–1.

p. Reconvened and improperly constituted boards.

(1) *Reconvened board.* Before final action on a case, the proceedings of a properly constituted PEB may be returned to the same board for further consideration of findings, correction of errors, or other reasons. When proceedings are returned, the reconvened board will include as many members of the original PEB as possible. However, proceedings may be conducted properly even though no members of the original board are available. The board must be otherwise properly constituted. The new members

must have acquainted themselves with the records of the case before reconvening the board. When reconvening the board with the same members would be prejudicial to the soldier, a new board with all new members will be convened. The case may be transferred to another PEB for this purpose. Proceedings will be the same (formal or informal) as were used at the original hearing and any transcript of the prior hearing will be included with the original and USAPDA copy of the case. If a formal hearing is held, the soldier (his or her next-of-kin or legal guardian if he or she represents the soldier's interests) will be notified of the new hearing date.Should the PEB reconsider the case and change its findings or recommendations, a new DA Form 199 will be prepared and referred to the soldier for his or her election. Despite the procedures employed, the soldier (next-of-kin or legal guardian) will be notified of the results if a change is made in the disposition or benefits from those originally recommended. The soldier will be afforded the opportunity to consult with counsel and to rebut any change. When new findings are made by the PEB, they become the only findings on which later action will be taken. If the reconsideration results in no change, a new DA Form 199 will not be prepared but the fact that the case was reconsidered will be reflected in block 16.

(2) *Improperly constituted boards.* Proceedings of an improperly constituted PEB are null and void. Whenever a hearing is discovered to have been conducted by an improperly constituted PEB, the record of proceedings less the DA Form 199 will be forwarded for the new hearing by a properly constituted board.

q. Action when soldier is AWOL or dies during disability processing.

(1) If a PEB receives information that a soldier whose case is in the disability system is AWOL, case processing will be suspended. If the soldier returns to military control within 10 days, processing may be resumed. Processing will include consideration of any new or increased disability incurred during the period of AWOL. Should the soldier not return to military control within 10 days, the case file will be returned to the MTF. If information that a soldier is AWOL is received after the case file has been forwarded for disposition, the PEB will promptly notify the USAPDA.

(2) If information is received that a soldier being processed for physical disability has died, disability processing will be discontinued and the case file will be returned to the MTF.

r. Disposition. PEB's will recommend disposition of the case according to the rules stated in table 4–2.

4–20. Informal board

a. Procedure. Each case is first considered by an informal PEB. Informal procedures reduce the overall time required to process a case through the disability evaluation system. An informal board must ensure that each case considered is complete and correct. The rapid processing intended by the use of informal boards must not override the fundamental requirement for detailed and uniform evaluation of each case. All evidence in the case file must be closely examined and additional evidence obtained if required. The PEB will consider each case using the policies of chapter 3 and the criteria provided in paragraph 4–19.

b. DA Form 199. The findings and recommendations of the informal PEB are recorded on DA Form 199 according to the procedures described in appendix D. If the soldier is on active duty, the original form, signed by the president of the PEB, the soldier's copy, and the MTF's copy will be promptly forwarded to the MTF commander concerned using the fastest means of transmission available. If the DA Form 199 is not received by the PEBLO, the PEB will prepare new copies and forward them promptly.

c. Soldier's election.

(1) DA Form 199, block 13, lists the election options available to the soldier for informal determinations. These include the following:

(a) Concurrence with the findings and recommendations and waiver of a formal hearing.

(b) Nonconcurrence with the findings and recommendations; submission of a rebuttal explaining the soldier's reasons for nonconcurrence; and waiver of a formal hearing.

(c) Demand for a formal hearing with or without personal appearance.

(d) Choice of counsel if a hearing is demanded.

(2) Soldiers indicate their elections by checkmark in block 13 and sign and date the original and MTF copies of DA Form 199.

(3) The election must be received at the PEB within 10 days from the soldier's receipt of the informal findings. See paragraph 4–20f below for procedures when elections and rebuttals are received after the required time.

d. PEBLO. In all informal cases, the PEBLO of the MTF having control of the soldier will be the counselor for the soldier. As such, the PEBLO is primarily concerned with the soldier's interests. The PEBLO should consult with, and obtain advice as needed from the local legal office, the legal counsel at the nearest PEB, or the Agency Judge Advocate. Upon receipt of the informal proceedings, the PEBLO will accomplish the following actions:

(1) Counsel the soldier according to appendix C. The soldier will be made fully aware of the election options available to him or her, the processing procedures, and the benefits to which he will be entitled if separated or retired for physical disability. As needed, the PEBLO should consult with the local finance officer and the installation Retirement Services Officer (RSO) when counselling on benefits. DA Form 5892–R (PEBLO Estimated Disability Compensation Worksheet) will be provided to the soldier as an estimate only of disability compensation. DA Form 5892–R will be locally reproduced on 8½ and 11 inch paper. A copy of the form for reproduction purposes is located at the back of this regulation.

(2) After the soldier completes block 13, the PEBLO will complete block 14 of the original and MTF copies of DA Form 199. If the soldier fails or declines to make an election, the PEBLO will prepare a brief statement describing the circumstances, indicating the date the soldier was first informed of, and counselled on, the informal board's action. The PEBLO will then forward the DA Form 199 and the statement to the PEB.

(3) In deleterious-type cases or others involving mental incompetence, the PEBLO will contact the next-of-kin or legal guardian (if one has been

appointed) and request that person to act in behalf of the soldier. If one cannot be located, the PEBLO will prepare a statement reflecting all actions taken to identify and contact a responsible person to act on behalf of the soldier and forward the statement for inclusion with the case. (See para 4–15*a* for guidance on establishing the next of kin.)

(4) If soldier elects formal hearing, forward soldier's medical records to the PEB if they were not submitted with MEBD proceedings for the informal PEB.

(5) Complete DA Form 5893–R (PEBLO Counseling Checklist/Statement).This form will be used to document counseling. At the time of the soldier's final election to PEB determinations, the PEBLO and soldier will sign the form. A copy will be forwarded to the PEB for inclusion in the record of proceedings. DA Form 5893–R will be locally reproduced on 8 1/2 and 11 inch paper. A copy of the form for reproduction purpose is located at the back of this regulation.

e. Disposition by PEB. Upon receipt of the soldier's completed DA Form 199 from the PEBLO, the PEB will take the following actions as applicable.

(1) If the soldier accepts the findings and recommendations of the informal PEB, the recorder will assemble the records as required by table 4–1. The proceedings will be approved for the SA and forwarded to PERSCOM for final disposition.

(2) If the soldier nonconcurs with the findings without submitting a rebuttal, the PEB will approve the proceedings for the SA and forward the case to PERSCOM for final disposition.

(3) If the soldier fails or declines to make an election within the prescribed time and the PEB has not received from the PEBLO the statement described in 4–20d(2) above, the PEB will contact the PEBLO to confirm the status of the soldier's election. When the PEBLO confirms the soldier has been informed of the findings and recommendations but has not made an election, the PEB will proceed as if the soldier has accepted the findings and recommendations. The proceedings will be forwarded to PERSCOM for final disposition. The forwarding memorandum will document the circumstances resulting in the waiver of election (fig 4–2). The PEB will forward a copy of the memorandum to the soldier through the PEBLO.

(4) In deleterious-type cases or those involving mental incompetence in which the next-of-kin or guardian fails to make an election on behalf of the soldier, the PEB will appoint legal counsel to act on behalf of the soldier. The counsel will prepare a memorandum documenting the results of his or her action (fig 4–3).

(5) If the soldier nonconcurs and submits a statement or rebuttal to the recommended findings without asking for a formal hearing, the PEB president will respond in writing to the soldier, normally within 3 days. When the soldier's rebuttal does not result in a change to the PEB's findings, the response will acknowledge receipt of the rebuttal and explain the PEB's decision to adhere to the earlier findings. The soldier will be advised that the rebuttal will be included in the case file and considered in the review action by USAPDA. A copy of the PEB president's letter will be included in the case file.

(6) If the soldier nonconcurs with the findings and recommendations with a statement of rebuttal

and demands a formal hearing, the PEB may reconsider their findings and recommendations in the light of the soldier's statement of rebuttal. Should the PEB agree with the soldier and modify their findings and recommendations, the PEB will initiate a new DA Form 199 informing the soldier through the MTF commander of the results. If the soldier accepts them, the case will be processed as in paragraph 4–20*e*(1), above. Otherwise, the case will be scheduled for a formal hearing. The PEB will inform the appointed legal counsel of the pending action. If the soldier (in demanding a formal hearing) has elected to be represented by individual counsel, the appointed PEB counsel in coordination with the PEB president will make arrangements for the hearing with the individual counsel. If the soldier is at some location other than that of the PEB, the commanding officer will promptly issue necessary TDY orders for travel of the soldier using locally available funds.

(7) Whenever more than one hearing (including a reconsideration) is held on a case, a copy of the DA Form 199 for each hearing will be attached to the final DA Form 199 to reflect and explain the multiple considerations. For example, a copy of an informal board's DA Form 199 attached to the copy of the formal board's DA Form 199 will record the soldier's demand for a formal hearing without further comment or explanation.

f. Rebuttals. Rebuttals received after the allotted time or after initial election of concurrence.

(1) In those instances when a rebuttal from a soldier is received after the allotted time for submission of a rebuttal, or after a soldier has initially agreed with the findings and recommendations of the PEB and the case has been approved for the SA and

forwarded to PERSCOM for final disposition, the PEB will respond to the soldier as set forth below.

(a) If the rebuttal does not result in a change to the findings and recommendations, the PEB will advise the soldier in writing that no change is warranted and the rebuttal, together with the reply, has been forwarded to PERSCOM for inclusion in the case proceedings. The soldier retains the right to one formal hearing prior to final disposition by PERSCOM if the soldier is otherwise entitled and requests the hearing.

(b) When the rebuttal results in a change to the PEB's findings or recommendations, the PEB will recall the case and effect the necessary changes by preparing a new DA Form 199. The new findings will be furnished to the soldier. Normal processing procedures apply.

(2) Notwithstanding the above, when additional medical evidence or an addendum to the MEBD is received after the PEB has for-warded the case and the PEB determines that such evidence would change any finding or recommendation, the case will be recalled by the PEB and a new DA Form 199 issued. Normal procedures apply following the preparation of a new DA Form 199.

4–21. Formal board

a. Formal hearing. A soldier is entitled to a formal hearing if requested after informal consideration by a PEB. The soldier may waive this right by concurring in the findings and recommendations of the informal board. If the soldier is incompetent, the right to waive a formal hearing may be exercised by next-of-kin or legal counsel. After demanding a formal hearing, a soldier may later withdraw the

demand and accept the informal board's decision, in which case, the counsel will inform the PEB. The case will be forwarded to PERSCOM. The soldier must be counseled on the right to demand a formal board. If the soldier demands a formal hearing, he or she is entitled to counsel as provided in paragraph 3–10*d* and h below. A formal board will be convened when—

(1) A soldier (next-of-kin or legal guardian) demands it after electing not to accept the findings and recommendations of an informal board.

(2) The case file has been forwarded to PERSCOM for issuance of retirement or separation instructions and the soldier demands a formal hearing before PERSCOM action is final.

(3) After an informal board, the president of the PEB decides that a formal hearing is in the best interest of the soldier or the Army.

b. Formal board membership. A formal hearing will normally be conducted before a board composed of the same members who considered the soldier's case informally. The purpose of a formal hearing is to afford the soldier the opportunity to present views, testimony, and new evidence. The board members must consider these matters with open minds despite their earlier decisions. For this reason the challenge of a voting member, solely because the member took part in the informal board, ordinarily should be denied. If the soldier is able to establish that a member of the formal board is not impartial, that board member will be replaced. If a replacement for the successfully challenged member is not available, the CG, USAPDA will appoint another member to the PEB panel for the formal hearing. If an original voting member of the informal board is not available

for the formal hearing, that member may be replaced with another who is qualified to sit. The new member must become thoroughly acquainted with all pertinent records before the formal hearing is convened.

c. Hearing room. Locally available space will dictate the arrangement of the hearing room. The minimum requirement gives room for three board members, the recorder, the soldier whose case is to be heard, counsel for the soldier, and the reporter. Proper decorum consistent with the purpose of the hearing is important; however, every effort should be made to maintain a relaxed and courteous environment. Avoid any implication of adversary proceedings in the case.

d. Scheduling hearing. The president of the PEB will establish the date, time, and place of the hearing subject to the following:

(1) The soldier (next-of-kin or legal guardian) will be allowed a minimum of 3 working days to prepare for the hearing.

(2) The soldier may waive the 3-day period or any portion of it.

(3) If more time is required to prepare the case, the soldier will forward a written request for an extension to the president of the PEB. The president, in turn, will endorse the request to the soldier indicating approval or disapproval and forward a copy of the response to the soldier's counsel. In deciding whether to approve the request, the president must consider whether the soldier would be unable to receive a full and fair consideration of his case if a delay were not granted. The date and time of any rescheduled hearing will be specified in the endorsement. If, in the judgment of the PEB president, the

soldier or counsel are attempting to delay the hearing without valid reasons, the formal hearing will be held with or without the presence of the soldier and selected counsel.

(4) Ample travel time will be allowed if the soldier will be represented by his or her next-of-kin or legal guardian in those cases where the member is mentally incompetent or the physician determines that divulging information to the soldier would be harmful to his or her well being. Funded travel is authorized under the provisions of C6000 of the Joint Federal Travel Regulation. The MTF will issue invitational travel orders authorizing travel for one person.

(5) The PEB will—

(a) Notify the soldier (next-of-kin or legal guardian) of the scheduled hearing. Figures 4–4 and 4–5 show notification to the soldier based on soldier's selection of counsel. Figure 4–6 shows notification to the next-of-kin. DA Form 5890–R (Acknowledgment of Notification of Formal Physical Evaluation Board Hearing) will be enclosed with the letter of notification to the soldier or next-of-kin. DA Form 5890–R will be locally reproduced on 8½- and 11- inch paper. A copy of the form for reproduction purposes is located at the back of this regulation.

(b) Notify the board members, witnesses, counsel, reporter, and interpreter (if needed) of the date, time, and place of the hearing.

(c) Arrange for the attendance of all available military witnesses or, under appropriate circumstances, obtain depositions and other evidence.

(d) Ensure that the soldier's records are furnished to medical witnesses for review before hearing.

(e) Present all available evidence and witnesses to the board.

e. *Soldier's rights.*

(1) Certain rights accrue to a soldier whose case is under evaluation by a PEB. A counsel must be aware of these rights. When communicating with the soldier (next-of-kin or legal guardian), counsel must ensure the soldier knows and understands the rights that apply to the circumstances of the soldier's case. Although certain rights apply in all cases, some are particularly applicable during formal hearings, especially when the soldier is present at the hearing. These rights are described below:

(a) The Privacy Act of 1974 applies to information of a personal nature requested of the soldier during a formal hearing.

(b) The soldier may testify as a witness under oath in his or her own behalf, in which case the soldier may be cross-examined as any other witness.

(c) The soldier or the soldier's counsel may introduce witnesses, depositions, documents, or other evidence in his or her own behalf, and cross-examine witnesses who have been examined by the PEB including witnesses who have specific knowledge of the soldier's case and whose conversations have been summarized for the record.

(d) The soldier or soldier's counsel may make unsworn statements, orally, or in writing, or both, without being subject to cross-examination.

(e) The soldier may remain silent. The choice not to make a statement or answer questions is not to be considered adverse to the soldier's interests.

(2) Appointed counsel will use DA Form 5891–R (Acknowledgment of Counseling on Legal/Procedural Rights) to counsel the soldier on his or her procedural rights and to provide a record of such counseling. DA Form 5891–R informs the soldier of the rights described above, and requests acknowledgment by soldier's signature. A copy will be included in the record of formal proceedings and provided to the soldier. DA Form 5891–R will be locally reproduced on 8 1/2- and 11-inch paper. A copy of the form for reproduction purposes is located at the back of this regulation.

f. Failure to appear. If a soldier who has elected to appear at a formal hearing fails to do so, the president of the PEB will take the following actions:

(1) Suspend the hearing and determine the reason for the soldier's absence. Subject to the provisions of (2) below, if no reasonable excuse is apparent for the soldier's absence, the hearing may proceed. The president will include in the record a statement of circumstances. Should the soldier later appear before the hearing has been concluded, the president may recess the hearing. He may permit the counsel to brief the soldier on proceedings up to that point. The hearing will then proceed.

(2) A formal hearing may not proceed if the soldier's individually selected counsel (if the soldier has one and who has been determined to be available to represent the soldier) is absent, unless the appointed counsel is present in open session.

g. Waiver of appearance. A soldier may waive, in writing, his or her appearance at a formal hearing. In such a case, the appointed counsel (or individually selected counsel if the soldier has one) must be present. The counsel will represent the soldier during all open sessions of the hearing, and perform the duties required of counsel during post-hearing actions.

h. Counsel. For formal hearings at which the soldier will be present, each soldier will be represented by counsel unless representation is specifically declined in writing.

(1) *Representation.* The appointed PEB counsel, other military counsel if reasonably available and released by the counsel's command for this purpose, or civilian counsel of the soldier's choice will represent the soldier. A soldier may arrange for civilian counsel of the soldier's own choice at no expense to the Government. The soldier may present his or her case without counsel, in which case the soldier must conform to all procedural rules. The soldier must sign a statement specifically excusing appointed PEB counsel. The statement will be made a part of the record. The PEB president will require appointed counsel to remain in the hearing room even if counsel is released by the soldier in writing, except when counsel of choice is present. Appointed counsel will act as co-counsel when the soldier chooses another counsel unless excused by the soldier.

(2) *Duties.* The counsel safeguards the legal rights of the soldier. He or she remains in attendance at all open sessions of the board unless excused, in writing, by the soldier. Counsel's duties are to—

(a) Confer with the soldier and advise the soldier of his or her rights.

(b) Prepare the soldier's case for presentation to the board.

(c) Request the PEB arrange for the attendance of available witnesses or obtain their depositions or other specifically desired evidence in support of the soldier's position.

(d) Examine and cross-examine witnesses and otherwise assist the soldier in presenting his or her case.

(e) Submit oral or written arguments.

(f) Counsel the soldier on the board's findings.

(g) Upon request, assist in the preparation of the rebuttal.

(3) Mentally incompetent and deleterious-type cases. The appointed legal counsel will serve as counsel when the next-of-kin (or legal guardian) acts for the soldier in a case of this type unless replaced by special counsel. Funded travel is authorized as described in paragraph *d*(4) above. In the absence of the next-of-kin, the PEB counsel must be present, even though special counsel is representing the soldier, unless excused by the next-of-kin or special counsel in writing.

i. Records review by soldier. All records assembled for use during the hearing, including those furnished by HQDA and by other official sources, will be made available to the soldier and his or her counsel for review. The assembled records will include memoranda of conversations with individuals who have specific knowledge of the soldier's case, including, but not limited to, the soldier's chain of command or treating physician. In cases involving mental incompetence or deleterious-type cases, only the counsel and, if present,

the next-of-kin or legal guardian may examine the records. The soldier (next-of-kin or legal guardian) and counsel may make notes from the records to prepare the soldier's case properly. However, the PEB president may withhold from civilian counsel, next-of-kin, or legal guardian, any security information.

j. Challenges.

(1) The recorder will announce the names and grades of the members of the board present. Any member of the board or counsel who is aware of any facts that the member believes to be grounds for challenge against himself or any other member, including the president of the board, will state such facts. If it appears a member is subject to challenge for cause, and the fact is not disputed, the member will be excused and replaced. The recorder is not subject to challenge.

(2) The statutory right to a full and fair hearing includes the right to challenge for cause. Grounds for challenge may be made by a statement of any fact indicating any member should not sit as a member of the board in the interest of having the hearing and later proceedings free from substantial doubt as to legality, fairness, and impartiality. Not more than one member will be challenged at one time. Later challenges may be made against other members of the board after a ruling is made on a previous challenge.

(3) A challenge may be withdrawn at any time. If a challenge is not withdrawn, the board will give the soldier the opportunity to introduce evidence, examine the challenged member under oath, and make an argument as to why the challenge should be granted.

The PEB will decide if the challenge should be granted by majority vote of the remaining members following discussion in closed deliberation. If the challenged member is the president of the board, the next senior nonmedical board member will preside in the case. A tie vote will sustain the challenge. Upon reopening the board, the president of the board will announce whether the challenge has been sustained. This announcement will be reflected in the record. If the challenge is sustained, the proceedings will be suspended until a replacement for the challenged member is provided.

k. Verifying soldier's rights. When the hearing begins, the PEB president will assure himself or herself that the soldier has been informed of his or her rights. If it appears the soldier has not been so informed, the PEB president will recess the hearing and allow the counsel time to advise the soldier.

l. Proof of facts.

(1) *General.* Facts and circumstances relevant to the matter under investigation are most often proved or disproved, either directly or through inferences, by real (tangible) evidence, documentary evidence, testimony or statements of witnesses, and matters of which official notice may be taken without proof.

(2) *Real evidence.* A tangible object (for example, brace, crutch) which is material and relevant to the subject of the inquiry is real evidence. Whenever an item of real evidence would aid in establishing the existence or nonexistence of a fact, that item, or a photograph, description, or other suitable reproduction of it, should be included in the report of proceedings, together with any statement of witnesses necessary to identify the item and verify

the accuracy of the reproduction. Board members should not overlook their own observations respecting real evidence. If a board member observes an item and gains impressions not adequately portrayed by a photograph, chart, or other representation, he or she should ensure that an appropriate description of the item is made and included in the report.

(3) *Documentary evidence.* Documentary evidence consists of records, reports, letters, and other written, printed, or graphic materials which indicate the existence or nonexistence of a fact. Boards should be alert to discover all such evidence relevant to the matter under inquiry and to include the originals or copies in the record.

(4) *Testimony or statements of witnesses.* Oral or written accounts of matters within the personal knowledge of individuals usually constitute an indispensable part of the evidence considered by a board. Because, unlike real or documentary evidence, such evidence is not fixed as to form or substance, obtaining a witness' testimony or statement requires careful advance analysis of relevant matters of which the witness is expected to have knowledge and preparation of questions to elicit that knowledge without distorting its substance. A preliminary interview of the witness to clarify what information can be elicited is often appropriate, especially by the soldier's counsel and the recorder. Voting members, however, may not conduct separate interviews of witnesses.

(5) *Official notice.* Some facts are of such common knowledge that there is no need to obtain specific evidence to prove them (for example, general facts and laws of nature; general facts of history; location

of major elements of the Army; organization of the Department of Defense and its components).

m. Rules of evidence.

(1) *General.* Proceedings of the PEB are administrative and not judicial in nature; therefore, a board is not bound by the rules of evidence prescribed for trials by court-martial or for court proceedings generally. Accordingly, except as limited in (3) below, anything which in the opinions of reasonable persons is relevant and material to an issue, may be accepted as evidence. All evidence will be given such weight as is warranted under the circumstances.

(2) Best evidence. A board is not precluded from considering any evidence merely because there may be better evidence available to prove the same fact. Generally, however, an effort should be made to obtain the best evidence reasonably available, considering factors such as time, importance, and expense as well as the availability and reliability of substitute evidence. Although hearsay evidence may always be accepted, the personal statement or recent deposition of a witness is usually better evidence than an earlier written statement by that witness or having someone else state what the witness said.

(3) *Limitations.* Administrative proceedings governed by this regulation generally are not subject to exclusionary rules precluding the use of relevant evidence. However, the following does apply with regard to evidence which may be accepted and considered in a board.

(a) Privileged communications. The rules concerning privileged communications between client-attorney, and penitent-clergyman, apply to PEBs.

(b) "Off the record" statements. Findings and recommendations of the board must be supported by evidence contained in the record. Accordingly, witnesses should not be allowed to make statements "off the record" to board members in formal proceedings.

(c) Statements regarding disease or injury. Section 1219, title 10, United States Code (10 USC 1219) provides that a soldier may not be required to sign a statement relating to the origin, incurrence, or aggravation of a disease or injury that the soldier has suffered. Before any signed, written statement against the soldiers interest may be considered, it must be determined that such a statement was made voluntarily. Any statement signed after the soldier has been advised of the right not to make a statement is presumed to be voluntary and is valid for consideration. (This restriction does not include oral testimony.)

(d) Self-incrimination. Military witnesses will not be compelled to incriminate themselves, or to answer any question to which the answer might tend to incriminate them, or to make a statement or produce evidence if the statement or evidence is not material to the issue and might tend to degrade them (article 31, Uniform Code of Military Justice (UCMJ, Art 31)). Any witness not subject to the UCMJ, will not be required to make a statement or produce evidence which would deprive them of their rights under the Fifth Amendment of the United States Constitution.

n. Administering oaths. Voting members of a PEB, the recorder, counsel, and others who regularly take part in PEB evaluations and have no vested interest in the outcome of cases considered need not

be sworn before performing their duties. Officers are required in their oath of office to "carefully and diligently discharge the duties of the office to which appointed." Civilian employees are sworn to perform their duties faithfully. A high standard of performance is to be expected, therefore, of individuals assigned to these duties.

(1) A soldier appearing in his or her own behalf is not sworn unless the soldier elects to testify under oath. If the soldier chooses to be sworn, the oath or affirmation prescribed in (2) below will be used.

(2) Witnesses will sometimes have a vested interest in a case, often adverse to the soldier's or the Army's interest. Because this partiality is not evident initially, any person who is to testify will first be sworn. In deleterious-type cases or those involving mental incompetence, the next-of-kin or guardian will be sworn. If the witness desires to affirm rather than swear, the words "so help you God" will be omitted. The recorder will administer the following oath:

> "Do you swear (or affirm) that the evidence you shall give in the case now in hearing shall be truth, the whole truth, and nothing but the truth? (So help you God)?"

o. Attendance of witnesses. The board will summon available witnesses needed for the hearing. Either the soldier or the PEB may request attendance of a witness. Whether a witness is available depends on the conditions described below.

(1) Members and employees of the armed services located at the same installation as the PEB are usually available. If available, the commander or supervisor will ensure that they appear.

(2) Members and employees of the armed services located at other installations may be available. The PEB president will decide whether the presence of such witnesses is required for a full and fair hearing. If the PEB president decides the testimony of such a witness is needed and that alternative forms of evidence cannot be substituted for the personal presence of the witness, the commander or supervisor must ensure the witness is present.

(3) The soldier is responsible for arranging for the attendance of witneses who are not members or employees of the armed forces. Such witnesses attend hearings at no expense to the Government. Additionally, the soldier is entitled to present the testimony of any other soldier or employee of the Army, or other armed services, whom the soldier obtains at no expense to the Government, and whom is given leave to attend.

(4) Witnesses summoned by the PEB who are members or employees of the armed services are entitled to travel expenses and per diem allowances authorized by Joint Federal Travel Regulations. The commander of the command to which the witness belongs is responsible for these costs. If command funds are not available, and the PEB president still considers personal testimony by the witness essential, funds available to the PEB may be used to pay the costs.

(5) The PEB president may decide that the witness need not appear in person to testify. If so, he or she may authorize the soldier's military counsel to take the deposition at the witness' location. The counsel may take the deposition either personally or by arranging with the soldier's representative to do so. If the counsel is to take the deposition in person

and TDY is involved, the counsel will provide the PEB president a summary of the information he or she expects to discover and how it relates to the case. if the PEB president approves the TDY, the PEB will pay costs from travel funds available to the PEB. The deponent may be at a distance so that the military counsel is unable to take the deposition in person. If so, the soldier's counsel may request assistance from the staff Judge Advocate nearest the deponent's location. Should expenditure of per diem or travel funds be involved, the counsel will make his or her request through the PEB president who is considering the case. A summary of the information to be discovered will be included. If no expenditure of public funds is involved, the receiving PEB president will approve the request and refer it for action to the appropriate Staff Judge Advocate. If the requested action involves payment of TDY costs, expenses will be paid from funds available to the PEB president requesting the deposition. A counsel may believe that a deposition is required and it cannot be obtained as described above. If so, the counsel may make a request to the officer exercising GCMCA over the installation at which the PEB is located. If the GCMCA approves taking the deposition, he or she will refer the request to the GCMCA in the area in which the deponent is located for action. The deponent will return the deposition through the referring GCMCA. Depositions may be taken on oral or written questions. Depositions will be prepared as provided in rule 703, Military Rules of Evidence, Manual for Courts-Martial, United States, 1984.

p. Procedural objections. The soldier (the soldier's next-of-kin, legal guardian, or counsel) may object to any actions taken or proposed to be taken by the board or to the admission of evidence. When an

objection is made, it will be recorded as part of the record. The president of the board will rule on objections. If any board member dissents from the president's ruling, however, the board will be closed for deliberation and the objection will be ruled upon by majority vote. Upon reopening of the board, the ruling of the board will be announced in open session and recorded as part of the record.

q. Closed deliberations. Upon completing an open hearing, the board is closed for deliberation. The voting members decide the findings and recommendations according to policies stated in chapter 3 and criteria in this chapter.

r. Findings and recommendations.

(1) The board, upon completion of deliberations, will reopen and inform the soldier of the findings and recommendations. (In cases of mental incompetence or in deleterious-type cases, the board will inform the soldier's counsel, next-of-kin, or legal guardian.) If the soldier (soldier's next-of-kin or legal guardian) is not present at the hearing, notice of the findings and recommendations will be provided to them in writing. (Figs 4–7 and 4–8 respectively show a sample notification to the soldier and the next-of-kin.)

(2) The PEB may change, modify, or correct its findings and recommendations at any time before the record of proceedings is delivered to the CG, USAPDA or Commander, PERSCOM. When such changes are made in previously announced findings or recommendations, the PEB will inform the soldier (soldier's next-of-kin, counsel, or legal guardian) in writing, of the proposed change. The PEB will afford the soldier the opportunity to accept or rebut the proposed change.

(3) When the soldier personally appears before the board, the DA Form 199 will be prepared immediately following the conclusion of the hearing and a copy provided to the soldier. The soldier will be afforded the opportunity to make an election at this time but may choose to take the full time-period permitted for reaching a decision. When the soldier does not appear at the hearing, the DA Form 199 and election form will be transmitted to the commander of the applicable MTF within 24 hours of the adjournment of the hearing. The actual date of delivery to the soldier will be documented in the case file.

s. Soldier's response. DA Form 199–1 (Election to Formal Physical Evaluation Board Proceedings) will be provided to the soldier as the election statement to formal proceedings. This form is distributed from the Army Publication Center solely to PEBs.

(1) The DA Form 199–1 and the letter of rebuttal must be received at the PEB within 10 days from the soldier's receipt of the formal findings unless the President of the PEB approves a request for an extension of time. A request for an extension must be received within 10 days of the soldier's receipt of the DA Form 199. If the request for extension is denied, the original time frame remains applicable. A copy of the PEB's decision on the request for extension will be sent to the soldier's counsel.

(2) If the soldier's statement of election or a request for an extension of time is not received within the required time, the PEB will deem that the soldier has waived the right to an election. The proceedings will be forwarded to PERSCOM for final disposition. The forwarding memorandum will document the circumstances resulting in the waiver of election (fig

4–2). The PEB will forward a copy of the memorandum to the soldier through the PEBLO.

(3) A soldier who fails to make an election or to submit a statement of rebuttal to formal proceedings within the allotted time if he or she is in disagreement with the findings and recommendations, will forfeit the opportunity for USAPDA review of his or her case (para 4–21*t* below).

t. Rebuttals. Letters of rebuttal to the findings and recommendation of formal proceedings (to include the recommended disability percentage) must be prepared and processed according to the following guidance.

(1) A rebuttal may only be based upon one or more of the issues listed below and must provide rationale in support of the issue.

(a) The decision of the PEB was based upon fraud, collusion, or mistake of law.

(b) The soldier did not receive a full and fair hearing.

(c) Substantial new evidence exists and is submitted which, by due diligence, could not have been presented before disposition of the case by the PEB.

(2) If a letter of rebuttal is received within the required time frame, the PEB will respond to the soldier, or his representative, normally within 3 days confirming that the rebuttal has been received and considered. If consideration of the rebuttal does not affect the outcome of any portion of the PEB decision, the response will include the reasons why the rebuttal does not support a change to the findings and recommendations. The soldier will be informed

that the rebuttal will be forwarded with the case file to USAPDA for review (based on the soldier's election of nonconcurrence with submission of a rebuttal). The response by the PEB president will be included in the case file and a copy will be furnished to the soldier's legal counsel or other representative.

(3) If a soldier submits a letter of rebuttal after having initially made an election of concurrence and the rebuttal is submitted within the required time frame, the procedures of paragraph 4–21*t*(2) above apply. If the case has been forwarded to PERSCOM for final disposition based upon the soldier's initial concurrence, the PEB will recall the case. If the letter of rebuttal is received after the required time frame, the procedures of paragraph 4–2*t*(4) below apply.

(4) If a letter of rebuttal is received by the PEB after the soldier's case has been forwarded to PERSCOM for final disposition (based upon the soldier's failure to make an election within the required time frame or nonconcurrence without submission of a rebuttal) the PEB will consider the rebuttal as set forth below.

(a) If consideration of the rebuttal does not result in a change to the findings and recommendations, the PEB will advise the soldier, in writing, that no change is warranted and the rebuttal, together with the reply, has been forwarded to PERSCOM for inclusion in the case proceedings. A copy of the reply will be forwarded to the soldier's legal counsel or other representative. Review of proceedings by USAPDA is not required.

(b) When the consideration of the rebuttal results in a change to the PEB's findings and recommendations, the PEB will recall the case and effect

the necessary changes by preparing a new DA Form 199. The new DA Form 199 will be furnished to the soldier according to normal processing procedures.

(5) Notwithstanding the above, when additional medical evidence or an addendum to the MEBD is received after the PEB has forwarded the case to USAPDA or PERSCOM and the PEB determines that such evidence would change any finding or recommendation, the case will be recalled by the PEB and a new DA Form 199 issued. Normal procedures apply following the preparation of a new DA Form 199.

u. Mental incompetency. Formal proceedings of cases involving mental incompetency or nonappearance because of the MTF commander's decision that it would be detrimental for the soldier's well being to appear, will be processed as follows:

(1) The DA Form 199 and DA Form 199–1 with all exhibits will be forwarded by certified mail, return receipt requested, to the soldier's guardian or next-of-kin (fig 4–8). A copy of the forwarding letter will be provided to the soldier's legal counsel or representative.

(2) The transmittal letter will advise the individual of the following:

(a) The individual has the right to make an election (DA Form 199–1) and to submit a letter of rebuttal to any finding or recommendation.

(b) The election (DA Form 199–1) and rebuttal must be received at the PEB within 10 days of receipt of the DA Form 199 unless, within the 10-day period, the president of the PEB has approved a request for extension.

(c) A rebuttal submitted within the allotted time must be considered and the individual notified of the PEB's determination.

(d) Upon failure of the individual to submit an election within 10 days, the appointed military counsel will take proper action in behalf of the soldier.

(3) The PEB will not forward the case for disposition until the DA Form 199–1 has been received or counsel has acted in behalf of the soldier. Counsel's action will be documented by memorandum, a copy of which will be included in the case proceedings (fig 4–3).

Section V
Review and Confirmation of PEB Action

4–22. Review by USAPDA

a. Required review. USAPDA will review the following cases.

(1) General and Medical Corps officers found unfit.

(2) Informal proceedings when the soldier nonconcurs with the PEB findings and recommendations, waives a formal hearing, submits a statement of rebuttal within the required time frame, and consideration of the rebuttal by the PEB does not result in a change to its findings and recommendations.

(3) Formal proceedings when the soldier nonconcurs with the PEB findings and recommendations, submits a statement of rebuttal within the required time frame, and consideration of the rebuttal by the PEB does not result in a change to its findings and recommendation.

(4) Cases in which a voting member of the PEB submits a minority report.

(5) Any case previously forwarded to USAPDA for review and approval and which has been returned to the PEB for reconsideration or rehearing.

(6) Cases designated by the CG, USAPDA for review.

(7) Cases of soldiers assigned to USAPDA.

b. Purpose of review. The review will be confined to the case records and proceedings and related evidence. The review will ensure that the following criteria have been satisfied.

(1) The soldier received a full and fair hearing.

(2) The proceedings of the medical evaluation board and the PEB were conducted according to governing regulations.

(3) The findings and recommendations of the MEBD and PEB were just, equitable, consistent with the facts, and in keeping with the provisions of law and regulations.

(4) Due consideration was given the facts and requests contained in any rebuttal to the PEB findings and recommendations submitted by, or for, the soldier being evaluated.

(5) Records of the case are accurate and complete.

c. Determinations. Based upon review of the PEB proceedings, USAPDA may take the following actions:

(1) Concur with the findings and recommendations of the PEB or make minor changes or corrections that do not affect the recommended disposition of the soldier or lower the combined percentage rating.

(2) Return the case to the PEB for reconsideration, clarification, further investigation, a formal hearing, or other action when the case records show such action is in the best interests of the soldier or the Army. A detailed explanation for the reasons for return of the case will be provided to the PEB.

(3) Issue revised findings providing for a change in disposition of the soldier or change in the soldier's disability rating.

(4) Refer the case to the APDAB.

d. Revised findings. USAPDA, will take the following actions when modifying PEB findings and recommendations.

(1) Furnish the soldier (next-of-kin or legal guardian) a copy of the revision by certified mail, return receipt requested. The letter of transmittal will state the reason for the change. Information copies will be provided to the PEBLO and to the soldier's counsel.

(2) Advise the soldier (next-of-kin or legal guardian) that his or her election or rebuttal to the revision must be received by USAPDA within 10 days from the soldier's receipt of the revised findings unless a request for extension is received and approved within the same time frame.

(3) Return the case records to the PEB if the soldier is eligible for and requests a formal hearing or if one is directed under the provisions of 4–22*c*(2), above. Processing will be according to paragraph 4–21.

e. Consideration of rebuttal.

(1) After considering the soldier's rebuttal to the revised findings, USAPDA will make one of the following determinations:

(a) Accept the rebuttal; issue new findings and recommendations according to the rebuttal; and forward the case to PERSCOM for final action.

(b) Concur with the original recommendations of the PEB; forward the case to PERSCOM for final action.

(c) Adhere to the revised findings and recommendations and forward the case to APDAB.

(2) USAPDA, will inform the soldier in writing of the results of its consideration of the rebuttal.

f. Soldier's response.

(1) If the soldier concurs with the revised findings and recommendations, USAPDA will approve the case for the Secretary of the Army and forward the case to PERSCOM for final disposition.

(2) If the soldier nonconcurs and submits a statement of rebuttal explaining his or her reasons for disagreement, and the consideration of the rebuttal does not result in a change to the revised findings, USAPDA will forward the case to APDAB for review unless (3) below is appliable.

(3) If the soldier fails to submit an election within the allotted time, USAPDA will deem that the soldier has waived his or her right to file a rebuttal. The proceedings will be forwarded to PERSCOM for final action.

g. USAPDA disposition.

(1) The proceedings of general and medical corps officers found physically unfit will be forwarded to ASD(HA) for review prior to disposition by PERSCOM. This is not required if the finding is fit.

(2) If the case file is to be forwarded to APDAB for appeal action, USAPDA will prepare a cover letter explaining the reasons for referral and note that final decision is deferred to the APDAB. If the APDAB's decision is unfit, and if the soldier has requested Continuance on Active Duty (COAD) under chapter 6, APDAB will forward the file to the appropriate office for COAD review. When the case is that of a General or Medical Corps officer, APDAB will return the case to USAPDA for forwarding to ASD(HA). If the General or Medical Corps officer has requested COAD, USAPDA will forward the case for COAD review upon confirmation of unfit determination by ASD(HA).

(3) When proper authority (AR 600–8–1) has made an unfavorable LD determination on the soldier's unfitting condition, USAPDA will modify the PEB findings and recommendations. USAPDA will notify the soldier that the modification resulted from a final LD decision by HQDA and that neither USAPDA nor AP-DAB are the approving authority for an appeal of the LD decision. LD appeal are governed by AR 600–8–1. This does not preclude an appeal of the determination of physical unfitness. Nor does it preclude the right to a formal PEB hearing if the soldier has not had a formal hearing (para 4–19*g*(2)). If the case file is forwarded to PERSCOM (TAPC–PED–S) to await a final LD decision, USAPDA will reflect in the cover letter the result of review subject to the final LD decision.

(4) If notice is received that a soldier whose case is in the disability system is AWOL, USAPDA will suspend further action on the case. If the soldier has been AWOL for 10 days or more, USAPDA will verify the fact of AWOL and return the case file, less PEB proceedings, to the MTF to which the soldier belongs.

USAPDA will cancel PEB proceedings and notify the PEB and applicable MTF. If the case file has been forwarded to PERSCOM, USAPDA will recall the case for return to the MTF.

(5) With the exception of those cases noted above, USAPDA will approve revised findings for the Secretary of the Army and forward the case to PERSCOM for disposition.

4–23. Disposition of medical records

If the medical records were included in the case proceedings, they will be disposed of as follows:

a. If further review or appeal of the case is not involved, USAPDA will withdraw the medical records from the case file and will return them to the MTF that referred the case file to a PEB.

b. If the case is to be reviewed by APDAB or ASD(HA) and if the medical records are not included in the case, they will be requested and forwarded with the case file for the required review or appeal action. The review or appeal action may result in return of the case file to the CG, USAPDA, for final action. If so, the medical records will be disposed as indicated in paragraph "*a*" above.

Section VI
Disposition Subsequent to Adjudication

4–24. Disposition by PERSCOM

PERSCOM will dispose of the case by publishing orders or issuing proper instructions to subordinate headquarters, or return any disability evaluation case to USAPDA for clarification or reconsideration when newly discovered evidence becomes available and is not reflected in the findings and recommendations.

a. Actions based upon modification by *APDAB.* When APDAB changes the disposition of the soldier or lowers the disability rating, PERSCOM will—

(1) Notify the soldier (or next-of-kin, counsel, or guardian) of the changes by certified mail, return receipt.

(2) Furnish a copy of the notification to USAPDA, the PEB, and the PEBLO of the MTF concerned.

(3) Advise the soldier that his or her concurrence or rebuttal to the findings by the APDAB must be received by PERSCOM within 10 days of the receipt of the notification letter (based upon date of the certified return receipt) unless PERSCOM has approved an extension of time. Failure to respond within the allotted time will result in waiver of right to file a rebuttal to the new findings.

(4) If timely rebuttal is received, forward it and the proceedings to APDAB for reconsideration.

b. Final disposition. Based upon the final decision of USAPDA or APDAB, PERSCOM will issue retirement orders or other disposition instructions as follows:

(1) Permanent retirement for physical disability (see 10 USC 1201 or 1204).

(2) Placement on the TDRL (see 10 USC 1202 or 1205).

(3) Separation for physical disability with severance pay (10 USC 1203 or 1206).

(4) Separation for physical disability without severance pay (sections 630, 1162(a), 1165, or 1169, title 10, United States Code (10 USC 630, 1162(a), 1165, or 1169)).

(5) Transfer of a soldier who has completed at least 20 qualifying years of Reserve service, and otherwise qualifies for transfer as described in paragraph 8–9, to the Inactive Reserve on the soldier's request (section 1209, title 10, United States Code (10 USC 1209)).

(6) Separation for physical disability without severance pay when the disability was incurred as a result of intentional misconduct, willful neglect, or during a period of unauthorized absence (10 USC 1207).

(7) Release from active duty and return to retired status of retired soldiers serving on active duty who are found physically unfit.

(8) Return of the soldier to duty when he or she is determined physically fit.

(9) Provide to ASD(HA) one copy of all retirement orders issued in the case of each general officer (O–7 or higher).

c. AWOL. PERSCOM will take the following actions when notified that a soldier in the disability system is AWOL.

(1) Suspend disposition action.

(2) If the soldier has been AWOL for 10 days or more, or upon expiration of 10 days in AWOL status, verify with the unit commander the fact of AWOL.

(3) If AWOL status is confirmed, void the proposed disposition.

(4) Notify the soldier's commander, the PEBLO, and USAPDA of the revoked disposition.

(5) Return the case file to USAPDA.

d. Medical records. Upon completion of disposition processing, PERSCOM will remove medical records from the proceedings and return them to the MTF that referred the soldier to a PEB.

4–25. The APDAB

The Army Physical Disability Appeal Board is a component of the Army Council of Review Boards. It reviews cases forwarded by the CG, USAPDA as provided in paragraph 4–22*f*(2) above.

a. Determinations. The APDAB will determine if—

(1) The soldier received a full and fair hearing.

(2) The evaluation proceedings conformed to current laws and governing regulations.

(3) Findings and recommendations of the PEB, as changed or modified by the CG, USAPDA are supported by the evidence.

b. Actions. The APDAB will take one of the following actions and forward the case to PERSCOM (or to USAPDA if the case is that of a general officer or medical doctor).

(1) Concur with the decision of the CG, USAPDA.

(2) Concur with the recommendations of the PEB.

(3) Adopt the recommendations of the minority member of the PEB when PEB recommendations were not unanimous.

(4) Concur with the requests contained in the rebuttal submitted by the soldier being evaluated.

(5) Specify new findings and recommendations or other proper actions.

c. Limitations. APDAB does not have appellate review authority over modifications resulting from ASD(HA) decisions or adverse line of duty determinations by HQDA.

4–26. ADRRB

The Army Disability Rating Review Board (ADRRB) is a component of the Army Council of Review Boards (ACRB). The ADRRB reviews disability percentage ratings on request of a soldier who was retired because of physical disability.

a. Determinations. The ADRRB may notify or amend a fully executed retirement order of a soldier based upon the following criteria:

(1) The original order was based on fraud or mistake of law.

(2) The soldier was not granted a full and fair hearing when the soldier had made timely demand for such a hearing.

(3) Substantial new evidence exists which, by due diligence, could not have been presented before disposition was accomplished, and the evidence would have warranted a higher percentage of disability if presented before disposition.

b. Petition procedures.

(1) The person concerned, legal representative, or any informed DA authority may request relief on the grounds set forth above.

(2) The request for relief must be filed within 5 years from the effective date of the disposition complaint.

(3) Request for relief is addressed to the ADRRB. No special form is required. However, the petition

must state the reason for requesting relief and the relief desired.

(4) If the petition is based on evidence that is not on DA records, forward the evidence as an enclosure to the petition.

(5) The filing of a petition for relief will not affect the directed disposition unless the SA or authority acting for the SA so directs. If operation of the directed disposition is suspended by proper authority, the suspension does not extend the time limit within which an application for review must be submitted to a statutory board.

c. Review procedures.

(1) The ADRRB will consider all petitions submitted according to the criteria of paragraph 4–26*b* above.

(2) If the person concerned (or his or her legal representative) did not submit the petition, the ADRRB will give the retiree (or his or her legal representative) reasonable notice of the matter presented by the petition and the opportunity to submit a statement or other evidence in rebuttal.

(3) The Director, ACRB may act for the SA on petitions submitted if the recommendation of the ADRRB is unanimous. Other cases are referred to the SA for action. (The authority herein conferred is permissive only. It will not prevent referral of a case to the SA for action.) In acting on a petition, the Director, ACRB, may—

(a) Deny relief, set aside the final disposition or placement on the TDRL directed in a case and direct further retirement proceedings.

(b) Direct such action as is needed to effect the relief requested or any other action thought proper.

Appendix E
Personnel Processing Actions

E–1 General

This appendix prescribes personnel processing actions for soldiers undergoing physical evaluation under the provisions of this regulation.

E–2 Physical evaluation

a. When an MTF commander determines that a soldier will be processed for physical evaluation, the commander will—

(1) Decide whether the soldier will be assigned to the medical holding unit of the medical treatment facility (MTF). The decision will be based on whether the individual may render productive service to the parent unit while undergoing disability processing.

(2) Decide whether the soldier will be attached to the medical holding company of the MTF to make evaluation processing easier.

(3) Process soldiers on an outpatient basis from the parent organization whenever possible.

(4) In the case of medical officers assigned to his or her command, determine if medical evaluation by another MTF is required, as directed by AR 40–3, para 7–4.

b. The MTF commander is responsible for initiating proper actions relating to disability processing promptly. Such actions include—

(1) Moving the patient to another hospital if required.

(2) Moving the patient to the PEB if a soldier is to make a personal appearance at the board.

E–3. Individual records and property

The commander of the organization to which the soldier is assigned will—

a. Retain in their organization personnel records of soldiers attached to a medical holding unit.

b. Upon request, furnish the MTF commander, on a loan basis, records required in conjunction with the study and evaluation of the soldier.

c. Upon receipt of an order reassigning a soldier of the organization to a medical holding unit, forward the soldier's personnel and pay records to the MTF commander within 48 hours.

d. Forward individual clothing of the soldier according to AR 735–5.

E–4. Administrative control of soldiers before final PEB action

a. Soldiers processed as outpatients will remain available to the MTF commander or president of the PEB until the PEB completes action in his or her case.

b. Soldiers processed by MTFs in attached status will normally be retained at the MTF until PEB processing is completed. The soldier may, however, be authorized to reside elsewhere pending completion of PEB action.

c. Soldiers processed by MTFs in assigned status normally will remain at the MTF until PEB action is completed. The soldier may, however, be authorized to reside elsewhere pending completion of PEB action.

E–5. Administrative control of soldiers after PEB action

After PEB proceedings have been completed, the soldier's disposition will be according to the recommended findings of the board as indicated in*a*and *b*below. Do not separate the soldier from the service before notice is received of the final decision from HQDA.

a. Physically fit. The MTF commander will process the soldier according to AR 40–3 if the soldier concurs in the finding. If the soldier does not concur with the PEB's finding of fit, or is being processed in connection with mandatory or voluntary retirement, the MTF commander will retain the soldier under control, pending final action on the case at HQDA. If an inpatient, the MTF commander may place the soldier on duty within the MTF or with a nearby organization pending final action on the case. If the soldier is an outpatient, he or she will remain assigned to his or her parent organization pending final action on the case.

b. Physically unfit. The MTF commander will retain a soldier under his or her control pending final review and approval of his or her case.

c. Inpatient processing. A soldier who is an inpatient when his or her case is referred to a PEB may be—

(1) Retained as an impatient at the option of the MTF commander.

(2) Placed on duty within the MTF, if assigned to the medical holding unit, to perform such duties as his or her condition permits. DA Form 3349 will be furnished to the soldier and duty supervisor.

(3) Authorized to reside elsewhere pending completion of PEB action.

(4) Ordered on a permanent change of station home (PCSH). MTF commander may authorize a soldier to "PCS in awaiting orders status" to await final disposition of the disability case under certain conditions. The soldier must apply in writing through the PEBLO to the MTF commander using the memorandum at figure E–1. All the requirements listed below must be met.

(a) The soldier cannot be a Medical Corps officer whose case requires review by ASD(HA).

(b) A determination of in line of duty has been made.

(c) PCSH from continental United States (CONUS) to CONUS and outside continental United States (OCONUS) does not exceed normal separation or retirement entitlements specified by the JFTR.

(d) Soldier must be assigned to medical hold unit within CONUS.

(e) Soldier must be on extended active duty.

(f) Case must have been evaluated by the PEB with a finding that the soldier is unfit, and the recommended disposition must be disability retirement or discharge with or without severance pay.

(g) Soldier must have agreed with the informal PEB findings.

(h) Soldier must not have requested COAD or submitted a rebuttal requesting retention on active duty.

(i) Soldier must be competent.

(j) Soldier must not need further medical care at a military or VA facility.

(k) Soldier must not have a nondisability retirement or separation action pending.

(l) Soldier must be counseled on movement of dependents and households goods.

(m) Soldier must be advised that while in a PCSH status, he or she must return to unit of assignment, referring medical facility, or the PEB if directed to do so. A soldier will not have to return if the PEB recommendations are approved.

(n) Soldier must give the MTF commander a nonmilitary address and phone number where he or she can be reached and must advise the MTF commander of changes to that address or phone number.

(o) Soldier must acknowledge understanding that the number of days in PCS awaiting orders status must be deducted from the number of days leave accrued as of the date of retirement or discharge.

(5) Ordered to a VA hospital on a permanent change of station (PCS) as set forth in AR 40–3.

d. Change in status.

(1) If the soldier is rehospitalized before final disposition, amend orders to show the place and date of rehospitalization and authorization for travel between soldier's home and the MTF. Also show whether soldier is entitled to basic allowance for quarters (BAQ) and subsistence during hospitalization. Do not charge the soldier leave during hospitalization and connected travel. If rehospitalization is completed before final disposition of case, the soldier may again be placed on a PCSH status if requested.

(2) Furnish the PEB a copy of the soldier's request and orders directing PCSH to attach to the case records. If the records have already been sent to the CG, USAPDA, the PEB will send the request and orders to PERSCOM(TAPC–PDB). If the orders are later amended as described in (1) above, furnish the CG, PERSCOM, without delay, a copy of each amendment at the same address.

E–6. Soldiers located in overseas command

A soldier assigned in an overseas command, or who is on the TDRL and residing (not visiting) in the command, will be processed as follows:

a. Active duty. When the responsible overseas MTF completes the medical board proceedings, forward the medical records and related papers to the PEB. Should the soldier refuse to accept the findings and recommendations of the informal board and demand a formal hearing with personal appearance, the PEB conducting the informal hearing will schedule the formal board. The PEB will inform the overseas MTF commander of the scheduled hearing and request that the soldier's travel orders be issued. Authorize the soldier 5 days TDY at the PEB. The soldier will return immediately to his or her assignment overseas after the hearing unless otherwise directed by proper authority.

b. TDRL. When a soldier on the TDRL resides in an overseas command and demands a formal hearing with personal appearance, the soldier will perform necessary travel on the orders issued as prescribed in chapter 7.Authorize the soldier 5 days TDY at the PEB.

E–7. Continuance of disabled soldiers

Process disabled soldiers who request COAD according to chapter 6.

E–8. Army soldiers hospitalized in non-Army MTFs

Cdr, HSC is responsible for the administration of Army soldiers hospitalized in other than Army MTFs. This responsibility is exercised through Army MTFs designated by the HSC commander to assume responsibility for such soldiers as provided for in AR 40–3.

a. If transfer to an Army MTF is not contemplated or is inadvisable, commanders of Army MTFs designated to assume administrative control will exercise the functions and responsibilities necessary for the timely processing of such soldiers. If transfer of a soldier to an Army MTF is planned, defer disability processing until the soldier has been moved.

b. Medical board proceedings prepared by Navy and Air Force MTFs on Army soldiers will be routed through the responsible Army MTF commander and used for disability processing whenever feasible. Medical evaluation boards appointed by Army MTF commanders having administrative responsibility for soldiers in nonservice MTFs will evaluate such soldiers who require disability evaluation.

E–9. Final disposition instructions

After final approval, forward DA orders or other disposition instructions to the proper commander for final disposition. AR 635–10 establishes procedures for processing soldiers for retirement or discharge. The following instructions supplement those in AR 635–10 when soldiers who are unfit because of

physical disability are processed for retirement or discharge:

a. Discharge. Discharge will be effected usually within 20 days from the date of secretarial approval of the determination of physical unfitness advanced by the number of days accrued leave which can not be sold back to the Government (para "*d*" below.)

b. Retirement. Retirement processing must be completed by the effective date established in DA orders. Retirement dates will be established as follows:

(1) General officers. Date of retirement will be on an individual basis.

(2) Individuals processed for mandatory retirement. Date of retirement will be one of the following:

(a) The mandatory retirement date.

(b) As soon thereafter as possible, as provided in (4) below.

(c) An earlier date, if requested.

(3) *Individuals processing for voluntary retirement at time of referral into the disability system.* Date of retirement will be one of the following:

(a) The date originally requested.

(b) As soon after the date requested as possible, as provided in (4) below.

(c) An earlier date if requested later.

(4) *All others.* Date of retirement will usually be 20 days from the date of secretarial approval of the determination of unfitness advanced by the number of days of accrued leave which cannot be sold back to the Government.

c. Release from active duty of recalled retired soldier. Processing required will be completed and

the soldier released from active duty on the effective date established in DA orders.

d. Accrued leave. Soldiers may be permitted to use accrued leave in excess of that which may be sold back to the Government. If soldiers have not sold back their leave, they are required to do so in lieu of using their leave.

e. Requests for exception to established discharge or retirement date. Request for deviation from established discharge date or amendment or revocation of retirement orders for other than medical reasons will be submitted, with justification, to PERSCOM (TAPC–PDB). If the soldier is rehospitalized, and the presence of substantial new evidence indicates that the initial disability decision or percentage of disability should be changed, the MTF commander will notify the PEB that adjudicated the case. USAPDA will decide whether the case should be reconsidered by the PEB. USAPDA may request PERSCOM cancel discharge instructions, or amend or revoke retirement orders.

f. Responsibility of MTF commanders. MTF commanders will be responsible for final disposition of soldiers for physical disability separation within their area of responsibility.

E–10 Preparation and distribution of orders

Orders separating soldiers for physical disability will be prepared and distributed according to AR 310–10. If applicable, a statement will be made regarding termination of appointment.

E–11 Separation Documents

See AR 635–5 for instructions on completion of DD Form 214.

E–12. Type discharge certificate issued

a. Officers. Officers discharged for physical disability will be honorably discharged. Issue a DD Form 256A. An exception is a case in which the disability upon which discharge is based was the result of intentional misconduct or willful neglect of the officer concerned or was incurred during a period of unauthorized absence. In any of these circumstances, the officer will be discharged under honorable conditions and issued a DD Form 257A.

b. Enlisted personnel. Service of enlisted soldiers discharged by reason of physical disability normally will be characterized as honorable, or described as uncharacterized for those in entry level status. However, characterization of general under honorable conditions is authorized for soldiers beyond entry level status whose service is satisfactory, but not sufficiently meritorious to warrant honorable characterization.

E–13. Delivery of separation forms

Deliver separation forms to the soldier according to AR 635–5.If the soldier has been moved to a VA hospital before the date of separation or retirement, and is mentally incompetent, mail the separation forms to his or her next-of-kin or legal guardian. Furnish the director of the VA hospital a copy of the DD Form 214.

E–14. Retirement honors

Extend proper honors to soldiers retired for physical disability according to installation standing operating procedures.

No. 10-404

In the Supreme Court of the United States

MALCOLM G. SCHAEFER, PETITIONER

v.

JOHN MCHUGH, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an individual must demonstrate prejudice in order to prevail in an action under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, challenging the Department of the Army's alleged violation of internal procedural regulations governing the revocation of authority to issue discharge papers.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 608 F.3d 851. The opinion of the district court (Pet. App. 8a-31a) is reported at 607 F. Supp. 2d 61.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2010. The petition for a writ of certiorari was filed on September 20, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. In 2000, petitioner was in the fourth year of a six-year commitment to the United States Army, serving as an Army lawyer in the Judge Advocate General's Corps (JAG) at Fort Benning, Georgia. Petitioner sought a

medical discharge from the Army because of knee injuries, but he hid his actions from his superiors. In early July 2001, petitioner obtained orders setting a discharge date of September 14, 2001. Pet. App. 2a.

In late July 2001, a JAG employee learned of petitioner's pending discharge while updating records. The next month, after the JAG personnel office informed the Army's Physical Disability Agency (USAPDA) that petitioner's injuries would not preclude his service as a military lawyer, USAPDA revoked the authorization for petitioner's discharge and issued a new medical determination deeming petitioner fit for duty. The Army informed petitioner of that determination on September 5, 2001, but petitioner nevertheless arrived to obtain his discharge on September 14. As a result of an administrative error, the clerk issued petitioner a discharge certificate. Petitioner's superiors did not learn of the error until they found his office empty on the following Monday. Pet. App. 2a-3a.

The Army conducted an investigation and promptly sent petitioner a letter directing him to report back to Fort Benning. After petitioner unsuccessfully sought to enjoin the Army from taking action against him, *Schaefer* v. *White*, 174 F. Supp. 2d 1374, 1384 (M.D. Ga. 2001), he resumed work as a JAG attorney. Pet. App. 3a.

After petitioner's return, the Army issued him a highly critical Officer Evaluation and a Memorandum of Reprimand for wrongfully obtaining his discharge certificate. The Army also charged him with violating the Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*, by obtaining a fraudulent discharge. Rather than undergo trial by a court-martial, petitioner voluntarily resigned, and he left the Army on October 1, 2002. Pet. App. 3a.

Approximately two years later, petitioner filed a request with the Army Board of Correction for Military Records (Board) to remove certain entries in his official military personnel files. Specifically, petitioner sought to validate his September 2001 discharge; nullify his October 2002 discharge; expunge the adverse Officer Evaluation, Memorandum of Reprimand, and resignation from his record; and prevent the Army from recouping his severance pay associated with his 2001 discharge. The Board denied his request, concluding that his 2001 discharge orders lacked legal effect because the authority to issue them had been properly revoked. The Board also determined that petitioner had failed to show that his Officer Evaluation, Memorandum of Reprimand, or resignation should be removed from his service record. Pet. App. 4a.

2. Petitioner then brought this action under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, arguing that the Board's decision was arbitrary, capricious, and contrary to law. The district court granted summary judgment to the government. Pet. App. 8a-31a.

3. The court of appeals affirmed. Pet. App. 1a-7a. Petitioner argued that the revocation of his discharge violated Army regulations because it was carried out by USAPDA rather than a different entity, the Total Army Personnel Command (PERSCOM). The court rejected that argument, concluding that petitioner had "failed to show that he suffered any prejudice from the Army's alleged error regarding which entity could technically revoke the authorization for his discharge." *Id.* at 6a. The court therefore found it unnecessary to consider the Board's alternative holding "that the Army did not commit procedural error" in any event. *Ibid.* Because the authority to issue a discharge had been revoked, the

court saw "no persuasive grounds on which to second-guess the Correction Board's conclusion" that petitioner's September 2001 discharge was invalid. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 14-28) that he should not have been required to show prejudice in order to prevail on his claim that the revocation of his discharge from the Army violated Army procedural regulations. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Although petitioner identifies some disagreement among the courts of appeals concerning when a showing of prejudice is necessary in an APA action, he has not shown that any court of appeals would have decided his case differently. In addition, this case would be a poor vehicle for considering the question presented because petitioner's underlying claim—that the Army failed to comply with its regulations—lacks merit. Further review is not warranted.

1. The court of appeals correctly held that petitioner "must demonstrate some form of prejudice" to obtain relief based on his claim that the Army failed to comply with its procedural regulations. Pet. App. 6a. Congress specified in the APA that, when agency action is challenged in court, "due account shall be taken of the rule of prejudicial error." 5 U.S.C. 706; see *Shinseki* v. *Sanders*, 129 S. Ct. 1696, 1704 (2009). Accordingly, when an agency has committed a legal error, "the burden of showing that [the] error is harmful normally falls upon the party attacking the agency's determination." *Id.* at 1706; see *American Farm Lines* v. *Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (stating that, as a "general principle," an agency has discretion "to relax or modify its

procedural rules," and its decision to do so "is not reviewable except upon a showing of substantial prejudice to the complaining party") (internal quotation marks and citation omitted).

Petitioner cites no decision of this Court that rejects or limits the prejudice requirement in this context. None of the cases that petitioner cites even mentioned prejudice—except for those, such as *American Farm Lines*, that required some showing of prejudice. Petitioner cites (Pet. 25-26) various cases in which the Court granted relief without expressly considering the issue of prejudice, but in most of those cases the prejudicial nature of the violation was apparent without discussion. See, *e.g.*, *Service* v. *Dulles*, 354 U.S. 363, 386 (1957) (Secretary of State violated regulation by overturning Deputy Under Secretary's approval of a decision clearing petitioner of disloyalty charges); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 266-267 (1954) (Board of Immigration Appeals allegedly violated regulation by failing to conduct an independent review of petitioner's case). The authorities on which petitioner relies stand only for the proposition that agencies are required to follow their own regulations, and that their failure to do so constitutes legal error. That proposition is entirely consistent with a prejudice requirement, under which courts ordinarily grant relief only where the agency's error has actually caused identifiable harm to the plaintiff.

2. Petitioner contends (Pet. 14-20) that this Court's review is warranted because the courts of appeals disagree about whether a party must establish prejudice in order to successfully challenge an agency's failure to follow its regulations. In particular, petitioner cites cases in which other courts of appeals stated that a party

challenging an agency's violation of a regulation need not make a specific showing of prejudice if the regulation at issue is "designed to protect constitutional and statutory rights," Pet. 16 (citing *Leslie* v. *Attorney Gen.*, 611 F.3d 171 (3d Cir. 2010), *Martinez-Camargo* v. *INS*, 282 F.3d 487 (7th Cir. 2002), and *Waldron* v. *INS*, 17 F.3d 511 (2d Cir. 1993), cert. denied, 513 U.S. 1014 (1994)), or "confers important procedural rights and benefits," Pet. 18 (citing *Wilson* v. *Commissioner of Soc. Sec.*, 378 F.3d 541, 547 (6th Cir. 2004)). In the cited cases, the courts did not consider the potential relevance of 5 U.S.C. 706, which requires that "due account shall be taken of the rule of prejudicial error." And in two of the cases, the courts ultimately required prejudice to be shown, concluding that the exception to the prejudice requirement did not apply to the particular regulations at issue. See *Waldron*, 17 F.3d at 518-519; *Martinez-Camargo*, 282 F.3d at 492.

Contrary to petitioner's argument, the cited cases do not squarely conflict with decisions of other circuits, such as the decision below, that have required a showing of prejudice in cases concerning violations of certain regulations. The various cases on which petitioner relies involved different regulations, and petitioner identifies no case in which a court has held, as a categorical matter, that there are no circumstances in which a party challenging the violation of an agency regulation might prevail without making a specific showing of prejudice. Whatever tension might exist in the abstract statements of the various circuits, there is no direct conflict warranting this Court's review.

More importantly, petitioner cannot show that any court of appeals would have resolved this case differently. The specific Army regulations at issue here ad-

dress a technical question of internal management: the role of a specific Army sub-entity—PERSCOM—in transmitting the revocation of authority to issue particular discharge papers. Petitioner cannot show that those regulations either protect fundamental constitutional or statutory interests or confer important procedural rights and benefits, such that any court would deem their violation to be a basis for reversal without regard to an assessment of prejudice. Petitioner argues (Pet. 21-22) that the overall system of personnel-discharge regulations is designed "to ensure the precise line between soldier and civilian" because the scope of certain constitutional rights is narrower for soldiers than for civilians. But the regulations give PERSCOM no meaningful role in drawing that line, because PERSCOM is not authorized to decide whether a soldier should be converted to civilian via discharge; it has only a ministerial role in transmitting and publishing such decision. Pet. App. 25a-26a; Army Reg. 635-40, ¶¶ 4-24(b), 2-3(b).

In addition, in arguing that the system is designed to "ensur[e] that the rights and interests . . . of the soldier are protected," Pet. 23 (quoting Army Reg. 635-40, ¶ 1-1(c)), petitioner overlooks the system's concerns for the "rights and interests of the Government," as well as the concerns for "an effective and fit military organization" and "prompt disability processing," Army Reg. 635-40, ¶ 1-1(a) and (c). In any event, petitioner fails to establish that the specific procedural regulations alleged to have been violated were intended "primarily to confer important procedural benefits," rather than "adopted for the orderly transaction of business before [the agency]," such that substantial prejudice would be required in any circuit. *Wilson*, 378 F.3d at 547.

3. Even if the question presented otherwise warranted review, this case would be a poor vehicle for considering it because petitioner cannot demonstrate that the Army violated its regulations in the first place. As the Board and the district court correctly concluded, PERSCOM's only role under the regulations was the ministerial transmission and publication of decisions issued by USADPA, and any regulatory "requirement for PERSCOM to authorize reconsideration [of a discharge] was not triggered" since the initial decision to authorize discharge had not been transmitted through PERSCOM. Pet. App. 91a, 89-90a, 26a-28a; Army Reg. 635-40, ¶¶ 2-3(b), 4-24(b), 4-22(b)(3) and (c)(2), App. E-9(e). The court of appeals had no occasion to consider that holding of the district court, but it would provide an alternative ground for affirming the judgment below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 10-404

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MALCOLM G. SCHAEFER,

Petitioner,

v.

JOHN R. MCHUGH, SECRETARY OF THE ARMY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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INTRODUCTION

The petition should be granted because the decision below turns on an important and recurring issue of administrative law – *i.e.*, whether a party challenging an agency's failure to follow its own regulations also bears the burden of proving prejudice - that has generated a deep and persistent conflict among the federal circuits.

In its Opposition ("Opp."), the government candidly acknowledges that there is "disagreement among the courts of appeals concerning when a showing of prejudice is necessary." Opp. 4. As Schaefer has demonstrated, the Ninth, Federal, and D.C. Circuits impose a burden on a claimant to demonstrate prejudice whenever challenging an agency's violation of its own regulations. Pet. 14-16. In contrast, the Second, Third, and Seventh Circuits, do not require a claimant to establish prejudice when an agency violates a regulation designed to protect individual constitutional or statutory rights. *Id.* at 16-18. Similarly, the Sixth Circuit does not require a claimant to demonstrate prejudice when an agency violates a regulation conferring important procedural rights and benefits. *Id.* at 18-19.

The government does not and cannot dispute that the conflict among the federal circuits is an important and recurring one. Instead, it argues that the circuit decisions do not squarely conflict because they did not involve the same regulations at issue in this case. That is wrong. The legal principle of administrative law set forth in the competing federal circuit decisions is not tied to a specific regulation or specific agency. Indeed, the D.C. Circuit's decision in this case holding that Schaefer was required to demonstrate prejudice from the Army's failure to

follow its regulations relies on prior decisions involving regulations promulgated by the Federal Aviation Administration. Pet. App. 6a (citing cases).

Moreover, as Schaefer has demonstrated, resolution of the conflict is outcome determinative because Schaefer would not have been required to establish prejudice if this case were litigated in the Second, Third, Sixth, or Seventh Circuits. Pet. 20-24. In the decision below, however, the D.C. Circuit denied relief because it concluded "Schaefer failed to show that he suffered any prejudice from the Army's alleged error." Pet. App. 6a. Contrary to the government's argument (Opp. 6-7), the decision below thus squarely implicates this deep circuit conflict.

Finally, the government cannot overcome (Opp. 4-5) Schaefer's showing that the D.C. Circuit's decision conflicts with this Court's precedent. For example, in *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), the Court held that if the claimant could show the agency's violation of its regulation, "he should receive a new hearing," and, in so concluding, the Court did not require a showing that the agency would have reached a different result and, indeed, made clear that it was not reviewing "the *manner* in which discretion was exercised" by the Board. *Id.* at 268.

The Petition should be granted.

I. THERE IS A DEEP CONFLICT OVER WHEN A PARTY CHALLENGING AN AGENCY'S FAILURE TO FOLLOW ITS REGULATIONS MUST SHOW PREJUDICE.

In the petition, Schaefer demonstrated that there is a deep conflict among the federal courts of appeals on the issue of when a party challenging agency action

must demonstrate prejudice from the agency's failure to follow its own regulations. Pet. 14-20. The government acknowledges this divergence among the circuit courts, Opp. 4, but nevertheless argues that review should be denied, *id.* at 5-6. Its arguments should be rejected.

The government contends that the circuit cases identified in the petition "do not squarely conflict" because they "involved different regulations." Opp. 6. That argument is meritless. The legal standards set forth in the conflicting federal circuit decisions are not limited to the specific regulations or the specific agencies at issue. Rather, each court articulated a general rule of administrative law governing whether a claimant who shows that an agency's action was reached in violation of its regulations also bears the burden of establishing prejudice.

For instance, in *Leslie* v. *Attorney General of the United States*, 611 F.3d 171 (3d Cir. 2010), the Third Circuit established "a framework for determining when judicial relief for a regulatory violation must be premised upon a showing of prejudice." *Id.* at 177; *id.* at 178. It held "that violations of regulations promulgated to protect fundamental statutory or constitutional rights need not be accompanied by a showing of prejudice to warrant judicial relief," *id.* at 178, and then applied that rule to the agency's failure to follow the immigration regulations at issue, *id.* at 179; see *id.* at 182 (concluding no showing of prejudice was required because the regulation protected the fundamental right to counsel at removal hearings).

Equally unpersuasive is the government's argument that "in two of the cases [cited by Schaefer], the courts ultimately required prejudice to

be shown." Opp. 6 (citing *Waldron* v. *INS*, 17 F.3d 511 (2d Cir. 1993), and *Martinez-Camargo* v. *INS*, 282 F.3d 487 (7th Cir. 2002)). In those cases, both the Second and Seventh Circuit established the legal principle that a claimant need not demonstrate prejudice for agency violations of regulations "promulgated to protect a fundamental right derived from the Constitution or a federal statute." *Waldron*, 17 F.3d at 518; see *Martinez-Camargo*, 282 F.3d at 492. To be sure, in applying that principle, the courts ultimately concluded that "the exception to the prejudice requirement did not apply to the particular regulations at issue." Opp. 6. Those outcomes, however, do not undermine that the standard set forth by the D.C. Circuit is in direct conflict with those in these circuits. Indeed, on that point, the government concedes that the circuit courts are in "disagreement." *Id.* at 4.

II. THE CONFLICT AMONG THE FEDERAL COURTS OF APPEALS IS OUTCOME DETERMINATIVE IN THIS CASE.

1. Contrary to the government's argument (Opp. 4, 6-7), this case is an ideal vehicle for resolving this conflict. The petition demonstrates that this case would have been decided differently under the rule in the Second, Third, and Seventh Circuits, because the regulations at issue govern the proper manner for revoking an order discharging an individual from military service, and thus they protect fundamental rights "derived from the Constitution or a federal statute." *Waldron*, 17 F.3d at 518. Likewise, the decision would have been different in the Sixth Circuit because these Army regulations bestow important procedural rights and benefits on soldiers, and therefore no prejudice need be shown. See

Wilson v. *Comm'r*, 378 F.3d 541, 546-47 (6th Cir. 2004). Any doubt on this point is resolved by the Army's regulations, which expressly state that they are designed to "ensur[e] that the rights and interests of the Government and *the soldier* are protected." Army Reg. 635-40, ¶ 1–1(c) (emphasis added).

The government acknowledges that fact, in passing (Opp. 7), but insists that the regulations here do not protect constitutional or statutory rights or confer important procedural rights on soldiers because Personnel Command had "no meaningful role" and performed only a "ministerial" function. Opp. 7. That is wrong.

Under the Army regulations, Personnel Command is vested with authority to "issue needed orders or other instructions" for the Secretary of the Army. Army Reg. 635-40, ¶ 2–3(b). A "[r]equest for deviation from established discharge date or amendment or revocation of retirement orders for other than medical reasons will be submitted, *with justification*, to [Personnel Command]." Army Reg. 635-40, App. E–9(e) (emphasis added). As a result, the regulations require Personnel Command to evaluate the "justification" for deviating from a previously issued discharge order, and therefore its role cannot be merely "ministerial."

The government's argument also ignores Personnel Command's critical role under the Army's regulations establishing a carefully reticulated disability evaluation system that divides authority among four separate entities. That regulatory structure ensures a definitive determination on whether a soldier has been discharged and therefore would have the full panoply of constitutional protections afforded to civilians. See Pet. 21-22; see also Army Reg. 635-40,

¶¶ 4–9 to 4–24; DODD 1332.18 ¶ 3.2 (directing the Army to establish an evaluation system that "consist[s] of four elements: medical evaluation; physical disability evaluation, to include appellate review; counseling; and final disposition."). Indeed, it was by disregarding Personnel Command's role that the Army was able to deny Schaefer's status as a civilian, hold him under military control, and subject him to court martial proceedings. Pet. 9-11; Pet. App. 12a-16a; see *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 23 (1955) ("civilians are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution.").

As the government points out, Personnel Command may not alone, as one part of that four-part structure, "decide whether a soldier should be converted to civilian via discharge." Opp. 7. That, however, does not mean that Personnel Command's role in the decision regarding a discharge order is superfluous. To the contrary, under the Army's regulatory framework, action by Personnel Command may not be *sufficient* (by itself) to effectuate a discharge, but it is *necessary*.

The government quotes selectively from the Army's regulations to argue that the disability system regulations do not confer important procedural benefits to soldiers because they *also* promote "prompt disability processing" and "an effective and fit military organization" to the government. Opp. 7 (quoting, in part, Army Reg. 635-40, ¶ 1–1(a) and (c)). The full quotation confirms that the regulations are designed to protect both the government *and* individual soldiers: "The objectives of this regulation are to— ... Provide prompt disability processing while

ensuring that the *rights and interests of the Government and soldier are protected.*" Army Reg. 635-40, ¶ 1–1(c) (emphasis added). That the Army's regulations serve dual purposes – protecting soldiers *and* the government – does not diminish that they expressly provide disabled soldiers with important substantive and procedural rights. Under the standards set forth by the Second, Third, Sixth, and Seventh Circuits, the Army's violation of regulations designed to protect the rights and interests of soldiers would warrant relief without any additional burden of showing prejudice.

Finally, the government argues that the regulations at issue were merely "'adopted for the orderly transaction of business before [the agency].'" Opp. 7 (quoting *Wilson*, 378 F.3d at 547). The regulations quoted above reject that factual argument.

2. The government argues in the alternative that this case "would be a poor vehicle" for resolving the circuit split because the district court provided "an alternative ground for affirming the judgment below." Opp. 8. That argument is meritless.

The sole basis for the D.C. Circuit's decision is that Schaefer did not establish prejudice from the Army's failure to follow its regulations in revoking Schaefer's discharge. Pet. App. 6a. The D.C. Circuit expressly declined to address whether the regulations were violated. *Id.* ("We ... need not consider the former," *i.e.*, the Correction Board's conclusion "that the Army did not commit procedural error"); see also *Accardi*, 347 U.S. at 268 (remanding case for a determination whether the Board violated its regulations).

In all events, the government's argument is unavailing because the Army plainly violated its regulations. Indeed, the Correction Board recognized that under the Army's regulations only Personnel Command had authority to revoke Schaefer's discharge but justified its dismissal of those regulations by characterizing them as "outdated." Pet. App. 90a. Instead, the Correction Board approved of "policies and procedures in effect [that] were not contained in a regulation." *Id.* at 91a. In short, the government provides no persuasive "alternative ground for affirming the judgment below." Opp. 8.

III. CERTIORARI IS ALSO WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

Finally, the government argues, on the merits, that the decision below correctly required a showing of prejudice as a prerequisite to judicial relief. Opp. 4. Specifically, the government points to a provision in the Administrative Procedures Act ("APA"), which provides that "due account shall be taken of the rule of prejudicial error," 5 U.S.C. § 706, and asserts that no decision of this Court "rejects or limits the prejudice requirement in this context." Opp. 4-5. This argument provides no basis for declining review.

First, the provision of the APA quoted by the government was adopted in 1947 and was, therefore, in force when this Court established the *Accardi* doctrine in 1954 and refined it in subsequent decades. As noted, in *Accardi*, the Court reversed and remanded the case to allow an evaluation whether the agency had failed to comply with its regulations while "emphasiz[ing] that [the Court is] not here

reviewing and reversing the *manner* in which discretion" may have been exercised by the agency. *Id.* at 268.* As the Third Circuit recently recognized, "*Accardi* teaches that some regulatory violations are so serious as to be reversible error without a showing of prejudice." *Leslie*, 611 F.3d at 178.

Some of this Court's "most important decisions holding agencies bound by their regulations have been in cases originally brought under the APA." *United States* v. *Caceres*, 440 U.S. 741, 754 & n.19 (1979) (citing *Service* v. *Dulles*, 354 U.S. 363 (1957), and *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959)). As demonstrated in the petition, the cases noted by the Court are precisely the ones in which the Court did not require any showing of prejudice. Pet. 25 (discussing *Service* and *Vitarelli*). In *Vitarelli*, for instance, the Court required scrupulous obedience to the agency's regulations and declared that an agency's failure to follow them is "illegal and of no effect." 359 U.S. at 545.

Finally, to the extent that the government contends that this Court's decisions and those of a number of the federal circuits were wrongly decided in light of the language in Section 706 of the APA, that is a further basis for granting review in this case to

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* Legal scholars have already noted that although the procedural irregularities in some of the Court's cases "were quite arguably prejudicial, this cannot be said of" several of this Court's *Accardi* doctrine cases. Thomas W. Merrill, *The* Accardi *Principle*, 74 Geo. Wash. L. Rev. 569, 577–78 (2006). For instance, in *Yellin* v. *United States*, 374 U.S. 109 (1963), the Court reversed a contempt of Congress conviction based on "the Committee's failure to comply with its own rules" even though the Committee almost certainly would have denied the request had it been properly referred for decision. *Id.* at 114-21.

resolve that conflict. In all events, the "prejudicial error" provision in the APA cannot insulate an agency refusal to follow its regulations in a case, such as this one, where the regulations "confer important procedural benefits upon individuals." *Am. Farm Lines* v. *Black Ball Freight Serv.*, 397 U.S. 532, 538 (1970) (distinguishing *Vitarelli* because it involved rules that "confer[red] important procedural benefits upon individuals"); see Pet. 26. The D.C. Circuit's imposition of a prejudice requirement in all circumstances – including those involving regulations that protect the rights of individuals – is incompatible with this Court's decisions. This Court should also grant the petition to resolve this conflict.

CONCLUSION

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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